TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 316.

THE NATIONAL PARK BANK OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

WILLIAM REMSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 10, 1894.

(14,885.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 5, 1895.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between National Park Bank of New York, plaintiff, and William Remsen, defendant, a manifest error hath happened, to the great damage of the said National Park Bank of New York, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighth day of January, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 958. Supreme Court of the United States. National Park Bank of New York, plaintiff in error, *vs.* William Remsen, defendant in error. Writ of error. Barlow & Wetmore, attorneys for plaintiff in error. Wm. H. Ingersoll. Due service of a copy of the within writ of error is hereby admitted this eighth day of January, 1891. Wm. H. Ingersoll, attorney for defendant in error. 1.40, pd. U. S. circuit court. Filed Jan. 9, 1891. John A. Shields, clerk.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of National Park Bank of New York, plaintiff in error, against William Remsen, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 United States Circuit Court for the Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK }
against
WILLIAM REMSEN. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, this 10th day of January, in the year one thousand eight hundred and eighty-one.

[L. S.] JOSEPH M. DEUEL, *Clerk.*

BARLOW AND OLNEY,
Plaintiffs' Attorneys.

Office and post-office address No. 206 Broadway, New York city, New York.

4 United States Circuit Court, Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

The plaintiffs, by Barlow and Olney, their attorneys, complain of the defendant and show to the court for a first cause of action:

First. That at the times hereinafter mentioned the plaintiffs were, and that they still are, a corporation incorporated and existing under and by virtue of an act of Congress of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and has capacity to sue by the above title, and that they are and always have been located in the city, county, and State of New York, in the second Federal circuit, and that they have always carried on their business and now carry on their business, in said city, county, State, and circuit.

That the defendant at all the times hereinafter mentioned has resided and now resides in said State and said Federal circuit.

Second. That the German-American Mutual Warehousing and Security Company was incorporated on the 14th day of May, 1872, by and under an act of the legislature of the State of New
5 York, passed on the day last named and entitled "An act to incorporate the German-American Mutual Warehousing and Security Company," being act chapter 701 of the laws of 1872, which act is referred to and made a part of this complaint.

That the principal office and place of business of said company or corporation is and always has been in the city, county, and State of New York, and that said company began its business immediately upon the passage of said act.

Third. That, as plaintiffs are informed and believe, said company did not within twenty days from the first day of January, 1878, or within twenty days from the first day of January, 1879, or at any other time whatsoever, make a report, signed by its president and a majority of its trustees and verified by the oath of its president or secretary, and stating the amount of its capital and the proportion of its capital actually paid in and the amount of its existing debts and publish it or cause it to be published in a newspaper published in the city of New York and file it or cause it to be filed in the office of the clerk of said county, as is required by law.

That, as the plaintiffs are informed and believe, said company, did not within twenty days from the first day of January in any of the years above mentioned or at any time whatsoever in any of said years make or publish in any newspaper or file in any clerk's office any report signed by or verified by the oath of any of its officers or trustees or any other person or persons or stating the facts required by law *and* above mentioned or any facts whatsoever, but said company and its trustees and officers wholly neglected and failed
6 to comply with requirements of law in that behalf, being the requirements of law in respect to making and filing and

publishing annual reports contained in the "Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, 1848, and the several acts extending and amending the same; all of which the said German-American Mutual Warehousing and Security Company is by charter made subject to.

That said company never at any time in the years 1878 or 1879 made or filed or published the report provided for by section 12 of the act just mentioned or by any amendment of or addition to said act or said section, and never did anything of the kind or attempted to comply with said section.

That the defaults made, as above set forth (in making, filing, and publishing the reports required by law), in January of each of the years above mentioned have lasted and continued down to the present time.

Fourth. That, as the plaintiffs are informed and believe, the defendant, William Ramsen, was one of the trustees or directors of said company during the whole of the first twenty days of the year 1878 and of the year 1879 and during the whole of said years.

Fifth. And the plaintiffs further say that at the city of New York, on September 11th, 1878, a certain firm of Squires, Taylor & Co., in and by their said firm name, made a certain promissory note or instrument in writing in and of the following words and figures, to wit:

7 "$12,000. NEW YORK, *September 11th*, 1878.

"Four months after date, for value received, we promise to pay to the order of ourselves, at the National Park bank in New York, twelve thousand dollars, having deposited with said bank, as collateral security for payment of this or any other liability or liabilities of ours to said bank, due or to become due, or that may be hereafter contracted, the following property, viz: In the stores of the German-American Mutual Warehousing and Security Company, one hundred and twenty hhds. tobacco, the market value of which is now $15,000, with the right to call for additional security should the same decline; and, on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property or any part thereof, or any substitutes therefor, or any additions thereto, at any broker's board or at public or private sale, at the option of said bank or its president or cashier or its assigns, and with the right to be purchasers themselves at such broker's board or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above-mentioned or at any time or times thereafter, without advertisement or notice; and, after deducting all legal or other costs and expenses for collection, sale, or delivery, to apply the residue of the proceeds of such sale or sales so to be made to pay any, either, or all of said liabilities, as said bank or its president or cashier shall deem proper, returning the overplus to the undersigned.

"SQUIRES, TAYLOR & CO."

8 That before maturity thereof and for value, as plaintiffs are informed and believe, said note was duly endorsed by the payees thereof, and by the German-American Mutual Warehousing and Security Company, and was duly delivered so endorsed, and in the regular course of business, to the plaintiffs, who are now, and ever since have been, the legal owners and holders thereof.

And the plaintiffs further say that when the said note became due and payable, it was duly presented for payment at the place of payment therein named, and payment duly demanded which was refused, and thereupon said note was duly protested for non-payment, of all of which due notice was given to the German-American Mutual Warehousing and Security Company.

That said note has not been paid, nor has any part thereof been paid, except as is hereinafter mentioned.

Sixth. And the plaintiffs further say, that heretofore said Squires, Taylor and Forbes, in and by their said firm name, made four notes or instruments in writing, one of which was the note or instrument hereinbefore set forth, and the other three of which were in precisely the same form and tenor as that, except as to the dates, amounts and quantity of tobacco pledged, and all of which were payable in four months from their dates.

One of these other notes or instruments was for $10,000 and was dated the 27th day of August, 1878, and the amount of tobacco pledged thereby was 100 hhds.

9 Another of said notes was for $10,000 and was dated the 2nd day of September, 1878, and the amount of tobacco pledged thereby was 100 hhds.

Another of said notes was for $4,000 and was dated November 27th, 1878, and the amount of tobacco pledged thereby was forty hhds., this being the note mentioned in the second cause of action in this complaint.

That each and all of said notes were endorsed by the payees (makers) and by the German-American Mutual Warehousing and Security Company, and were delivered to the plaintiffs for value and before maturity, and were duly presented for payment at maturity, and payment was demanded and refused, and they were duly protested for non-payment and notice given to said endorsers in the same manner as occurred and was done in respect to the note hereinbefore set forth, and all said notes were at maturity and now are held and owned by the plaintiffs, none of them having been paid at maturity.

And the plaintiffs further say that besides the tobacco pledged in and by said notes and therein mentioned forty hhds. more of tobacco were delivered to the plaintiffs on or about the 30th day of December, 1878, on the same terms and conditions of pledge as the other tobacco as such terms and conditions are set forth in the note of September 11th, 1878, heretofore mentioned.

And the plaintiffs say that, under and by virtue of and in accordance with the provisions of said notes and at the request and by the direction of the makers of said notes, they, the plaintiffs, have sold

all the several lots of tobacco mentioned in said notes and the
10 additional 40 hhds. above mentioned, such sales having been made upon the occurrence of the facts authorizing them, as provided in and by said notes, and have realized from all of it a net aggregate of $23,770.88, all of which sum was received by the plaintiffs between the 15th day of January, 1879, and the 8th day of May, 1879, $1,494.14 thereof being received on May 7th, 1879.

And the plaintiffs say that they have so applied said net sum as between all said liabilities in accordance with the powers given to them, the said plaintiffs, in and by said notes, as to leave due on May 7th, 1879, on the note hereinbefore mentioned and dated September 11th, 1878, the sum of $10,086.99, no part of which has been paid—that is to say, the plaintiffs say that of the proceeds of said tobacco they have applied such a sum to the payment of said $12,000 note of September 11th, 1878; that there is now due and unpaid on said note the sum of $10,086.99, with interest from May 7th, 1879.

Second.

And for a second and separate cause of action the plaintiffs say:

First. They repeat as a part of this cause of action the subdivisions of the first cause of action numbered 1st, 2nd, 3rd, and 4th and that part of the sixth subdivision of the first cause of action which relates to the making and contents of said four notes and the endorsing, delivering, non-payment, and protesting thereof, and the giving notice to the endorsers, and all that relates to said notes, and the pledging of the forty additional hhds. of tobacco, and
11 the sale of and realizing on all the tobacco pledged as security by or for said notes, and the amounts realized thereupon, with the dates of realizing, being the part of this complaint from and including line 13 on page 7 to and including line 12 on page 10 thereof, and including all parts of the fifth subdivision of this complaint which are referred to in and made a part of said sixth subdivision.

Second. They say that on the 27th day of November, 1878, said firm of Squires, Taylor & Co., by their said firm name, made their certain note or instrument in writing as follows, to wit:

"$4,000. NEW YORK, *November 27th*, 1878.

"Four months after date, for value received, we promise to pay to the order of ourselves, at the National Park bank in New York, four thousand dollars, having deposited with said bank as collateral security for payment of this or any other liability or liabilities of ours to said bank, due or to become due or that may be hereafter contracted, the following property, viz: In the stores of the German-American Mutual Warehousing and Security Company, forty hhds. of tobacco, the market value of which is now $5,000, with the right to call for additional security should the same decline, and on failure to respond this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property or any part thereof or any

substitutes therefor or any additions thereto, at any broker's board or at public or private sale, at the option of said bank or its president or cashier or its assigns, and with the right to be purchasers themselves at such broker's board or public sale, on the non-performance of this promise or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice, and, after deducting all legal or other costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale so to be made to pay any, either, or all of said liabilities as said bank or its president or casher shall deem proper, returning the overplus to the undersigned.

"SQUIRES, TAYLOR & CO."

That said note is the note for $4,000 referred to in the sixth subdivision of the first cause of action herein.

That before maturity thereof and for value, as plaintiff is informed and believes, said note was duly endorsed by the German-American Mutual Warehousing and Security Company and by the payees, its makers, and duly delivered so endorsed, and for value and before maturity, and in the regular course of business to the plaintiffs, who are now and ever since have been the legal owners and holders thereof.

And on information and belief the plaintiffs say that when the said note became due and payable it was duly presented for payment at the place of payment therein named and payment duly demanded, which was refused, and thereupon said note was duly protested for non-payment, of all of which due notice was given to the said German-American Mutual Warehousing and Security Company.

That said note has not been paid or any part thereof except as hereinafter mentioned.

13 And the plaintiffs further say that out of the aggregate of the net proceeds realized from the sale of the tobacco above mentioned, the plaintiffs, in accordance with the provisions of said notes and complying with all the conditions and directions thereof and by the direction of said Squires, Taylor & Co., applied to the payment of the note in question the sum of $1,494.14 above mentioned, which they received on May 7th, 1879, which application left due and unpaid on said note on May 7th, 1879, the sum of $2,534.64, part and parcel of said note, which sum is now due thereon with interest from May 7th, 1879.

Wherefore the plaintiffs demand judgment against the defendant for the sum of $12,621.63, being the balance due on the two notes above mentioned, and dated respectively September 11th and November 27th, 1878, with interest on said sum from May 7th, 1879, and costs of suit.

BARLOW AND OLNEY,
Plaintiffs' Attorney-, Office and P. O. Address
206 *B'way, New York City.*

CITY AND COUNTY OF NEW YORK, *ss.:*

Geo. H. Potts, being duly sworn, deposes and says that he is the president of the plaintiffs in the foregoing complaint named; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. H. POTTS.

Sworn to before me this 8th day of January, 1881.

S. B. WILKIN,
Notary Public, Kings Co. and for New York County.

14 (Endorsed:) United States circuit court, southern district of New York. The National Park Bank of New York *vs.* William Remsen. Summons and complaint. Barlow & Olney, attorneys for pl'ff, 206 Broadway, New York. I hereby certify that on the 10th day of January, 1881, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named William Remsen, by exhibiting to him the within original and at the same time leaving with him a copy thereof. Dated February 9, 1881. Louis F. Payn, U. S. marshal, S. D., N. Y. U. S. circuit court. Filed Feb. 9, 1881. Joseph M. Deuel, clerk.

15 Circuit Court of the United States for the Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
against
WILLIAM REMSEN.

The defendant, by William H. Ingersoll, his attorney, answers the complaint of the plaintiff herein:

I. As to paragraph "first" of said complaint he admits the same.

II. As to parapraph "second" of said complaint he admits the same.

III. As to folios 4, 5, 6, and 7, in paragraph "third" of said complaint, defendant denies that said German-American Mutual Warehousing and Security Company were required or bound by their charter or by law to make or file such a report as is there referred to or to publish the same, or that they ever failed or neglected to comply with any requirement of their charter or requirement of law in that behalf at any time, or that plaintiff is or ever was a creditor of said company or of defendant at or during the time of such alleged default as alleged in said complaint.

IV. As to paragraph "fourth" of said complaint defendant admits that he was and is a director of said German-American Mutual

Warehousing and Security Company, but denies that as such
16 he owed any duty or obligation to the said company or to the plaintiffs in relation to any such report as alleged in said complaint or in any way.

V. As to paragraph "fifth" in said complaint defendant denies any knowledge or information sufficient to form a belief except that since the death of Robert Squires, hereinafter mentioned, he has been informed that some such a note was made by Squires, Taylor & Co., but that the same related to their own firm business and not in any way to the business of said German-American Mutual Warehousing and Security Company, but whether said note as set out in said complaint is a copy or not defendant denies any knowledge or information sufficient to form a belief.

VI. That as to the allegation in folio 12 of said complaint defendant denies that said note or any like or any note of Squires, Taylor & Co., mentioned in said complaint, was duly endorsed by said German-American Mutual Warehousing and Security Company or any officer thereof thereto duly authorized or in any regular course of business of the said company, or that the note had anything to do with the company or its business, but that the same was a private and personal transaction between Squires, Taylor & Co. or some one of that firm and Robert Squires, and that said Robert Squires had no authority from said company or power to endorse the notes of said Squires, Taylor & Co. or any other party, as plaintiffs might have ascertained and known if they had made due enquiry, and that the said note was used and negotiated, if at all, by a fraudulent collusion between Squires, Taylor & Co. and Rob-
17 ert Squires, in which plaintiffs' bank was either in some way concerned or was wilfully negligent in the matter, and that the said transactions were never brought to the knowledge of the board of directors of said company or even to the knowledge of the individual directors, except said Robert Squires who so colluded in the said transactions, and the same were not discovered by this defendant until after the death of said Robert Squires, nor by the other directors until after said death, as deponent is informed and believes, and that said Squires had suppressed and concealed the said transaction from all the other officers and directors of the said company.

VII. As to paragraph "sixth" of said complaint defendant avers and reiterates as in last paragraph "VI" set forth as to each and every other of the several notes therein mentioned in detail and in the alleged causes of action set forth in said paragraph "sixth" of said complaint.

VIII. As to the allegation beginning with line 8 of folio "17" down to folio "20" defendant is informed and believes that plaintiff's bank had ample collateral security from said Squires, Taylor & Co. for each and all of said notes of said Squires, Taylor & Co. so discounted by it, and that the plaintiff negligently and recklessly sacrificed the same and negligently and to the damage of the makers thereof and all other persons connected in any wise therewith carelessly and wantonly caused and brought upon itself the loss which

they allege they suffered, and that by a careful, proper, and judicious sale of the said collateral tobacco it might have avoided any loss whatever in the premises as to either and all of said notes.

18 As to the "second" and separate cause of action alleged in said complaint defendant answers:

I. And as to paragraph "first," folio- 20 and 21, this defendant denies any knowledge or information sufficient to form a belief, except that he has, since the death of said Robert Squires, been informed and so learned for the first time that some such a note was made by Squires, Taylor & Co., but that the same related to their own firm business and not in any way to the business of the said German-American Mutual Warehousing and Security Company, but whether such note set out in the complaint is a copy of such note defendant denies that he has any knowledge or information sufficient to form a belief.

II. That as to the allegation in folios 22, 23, and 24 of said complaint defendant denies that such note or any like or any note of Squires, Taylor & Co. mentioned in said complaint was duly endorsed by the German-American Mutual Warehousing and Security Company or any officer thereof thereto authorized or in an regular course of business of said company, or that the note had anything to do with the said company or its business, but that the same was a private and personal transaction between Squires, Taylor & Co. or some or one of that firm and Robert Squires, and that said Robert Squires had no authority from said company or power to endorse the notes of said Squires, Taylor & Co. or any other party as plaintiffs might have ascertained and known if they had made due or any diligent inquiry, and that the said note was used and

19 negotiated if at all by a fraudulent collusion between Squires, Taylor & Co. and Robert Squires, in which plaintiffs' bank was concerned or was wilfully negligent in the matter, and that the said transactions were never brought to the knowledge of the board of directors of said company or even to the knowledge of the individual directors, and was only discovered after the death of said Robert Squires, who had suppressed and concealed the same from all other officers and directors of said company during his lifetime, and that as to any loss in the sale of the collateral referred to in said note, and as to all collaterals referred to in said complaint such loss arose if at all in consequence of the plaintiffs negligently and recklessly sacrificing such collateral, and that by a careful, proper, and judicious sale of the tobacco it might have avoided any loss in the premises whatever, as defendant is informed and believes.

And for a further and separate defence defendant avers that the said German-American Mutual Warehousing and Security Company is in no way whatever indebted to the plaintiff for or on account of the notes alleged in said complaint or on any account or in any way whatever, and he denies that he owed any duty or obligation to the plaintiff in any way, but that the transactions in question were in no way related to the business of the said company or of this defendant, and that the same arose, as this defendant is informed and believes, out of some fraudulent collusion between

Squires, Taylor & Co., or one or more members of that firm and Robert Squires, then president of the German-American Mutual Warehousing and Security Company, who fraudulently and
20 unlawfully assumed, with the knowledge of said firm, or one or more members of said firm, and for their benefit and advantage, and in some way for his own personal benefit and advantage to write the name of the German-American Mutual Warehousing and Security Company on the back of the notes in question herein, with his own name as "president," which writing, as defendant is informed and believes, was done by him before the several notes had been endorsed by the said payees, Squires, Taylor & Co., themselves, which act on the part of said Robert Squires was wholly without corporate or any authority from said company or this defendant, and was, and each said act was, an unfaithful, collusive, and fraudulent personal act on the part of the said Robert Squires, and beyond the scope of any duty, authority, or power of said Squires, and without the knowledge of this defendant or of any officer or director of the company except said Robert Squires until after the death of said Squires and the dishonor of said notes, until which time said Squires suppressed and concealed all knowledge of such transactions from the board of directors and the individual directors of said company, as defendant is informed by all the officers and directors of said company and verily believes and knows on his own part, which want of authority and fraudulent character of the transactions said makers of said notes well knew, and plaintiffs' bank were bound to know, and might and ought to have known, as they could and would have learned if they had made due or any enquiry of any of the directors of said company other than its said so colluding and conspiring president and that said Robert Squires, while so colluding and acting with said Squires, Taylor & Co., at the time, was connected
21 with plaintiff's bank's executive or finance committee, and had the negotiation of the very transactions in question on plaintiff's part, and that plaintiff might have learned of said Squires' want of authority and of the fraudulent character of the endorsements alleged by inquiring of any other officer or director of said company or of this defendant with whom plaintiff's bank and its then president were well acquainted and had had frequent personal business transactions, and plaintiff's bank knew or had reason to know that such alleged endorsements did not appear to be in the usual and lawful form required by the charter and by-laws of said company and used by it in its own proper and lawful business when authorized so to do in its own affairs.

And this defendant further avers:

That there is another action on the same notes referred to in the complaint herein, and for the same amount now pending in the superior court of the city of New York, which action has been pending for about a year, and has been defended by the German-American Mutual Warehousing and Security Company on substantially the grounds above set forth, which defences plaintiff therefore well knows and which action is yet undetermined, and it has never

been decided that the said company was acquainted with or in any way liable for the said unauthorized and fraudulent use of its name by said Squires on the notes in question, and that the plaintiff has not exhausted its remedy, if any one it has, on account of such pretended endorsements against the said makers of such notes or against the said company nor proved that such company owes it any debt, obligation, or liability or that it is in any way
22 or on account a creditor of said company, and defendant is informed and believes that the plaintiff has in some way privately released or agreed to release or by arrangement omitted to pursue to judgment its remedy and action against the said Squires, Taylor & Co., the makers of said notes and their principal debtors, or in some way agreed or stipulated to protect them from or not pursue their claims against the said makers of such notes, and that the said Squires, Taylor & Co. have not made any defence to plaintiff's action on said notes, although they professed and pretended to this defendant and others to have a good defence, and to intend to present and urge the same.

And this defendant denies each and every other allegation in said complaint contained.

Wherefore this defendant demands judgment against the plaintiff that said complaint be dismissed with costs.

W. H. INGERSOLL,
Defendant's Attorney, Office and Post Office Address,
261 *Broadway, New York City.*

CITY AND COUNTY OF NEW YORK, *ss:*

William Remsen, being duly sworn, says that he is defendant above named; that the foregoing answer is true of his own knowledge except as to matters therein stated to be alleged on infor-
23 mation and belief, and as to those matters he believes it to be true.

WILLIAM REMSEN.

Sworn to before me this 10th day of February, 1881.
HENRY REMSEN,
Notary Public (*No.* 72), *N. Y. Co.*

(Endorsed:) U. S. circuit court for the southern district of New York. The National Park Bank ag'st William Remsen. Answer. William H. Ingorsoll, defendant's attorney, 261 Broadway, New York. Barlow & Olney, plff's att'y. U. S. circuit court. Filed Feb. 11, 1881. Joseph M. Deuel, clerk.

24 United States Circuit Court, Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

On the consent of Barlow & Olney—
It is ordered that Messrs. Barlow, Olney & Wetmore be, and they

hereby are, substituted as attorneys for the plaintiff herein in the place of Barlow and Olney.

We consent to the entry of the foregoing order.

New York, March 15, 1884.

BARLOW & OLNEY.

25 United States Circuit Court for the Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

We hereby consent that Messrs. Barlow and Wetmore be substituted in our place and stead as attorneys for the plaintiff herein, The National Park Bank of New York.

Dated New York, September 12th, 1884.

BARLOW, OLNEY & WETMORE.

(Endorsed:) United States circuit court for the southern district of New York. The National Park Bank of New York *vs.* William Remsen. Consent of substitution. Barlow & Wetmore, att'ys for plaintiff, 206 Broadway, New York city. U. S. circuit court. Filed Sept, 12, 1884. Timothy Griffith, clerk.

26 United States Circuit Court, Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

On reading and filing the consent of Barlow, Olney & Wetmore, and on motion of Mess. Barlow & Wetmore, it is hereby—

Ordered that Mess. Barlow & Wetmore be, and they are hereby, substituted in place of Mess. Barlow, Olney & Wetmore as attorneys for the plaintiff herein, The National Park Bank of New York.

New York, Sept. 12, 1884.

27 Circuit Court of the United States for the Southern District of New York.

NATIONAL PARK BANK OF NEW YORK
against
WILLIAM REMSEN.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that at the trial of said action a jury be waived, and that the trial be had before the judge without a jury.

Dated April —, 1890.

BARLOW & WETMORE,
Pl'ff's Attorneys.
WM. H. INGERSOLL,
Defendant's Attorney.

(Endorsed:) C. C. of the U. S., S. D. of N. Y. Nat. Park Bank of N. Y. *v.* Wm. Remsen. Consent waiving jury, &c., U. S. circuit court. Filed Apr. 23, 1890. John A. Shields, clerk.

28 Circuit Court of the United States, Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

I, Alfred C. Coxe, the judge who tried the above-entitled action, find the following to be the facts in this case:

First. At the times hereinafter mentioned, and at the time this action was begun, which was on January tenth, 1881, the plaintiff was a national bank, incorporated under the national banking laws of the United States, and located in the city and State of New York.

During the same times the German-American Mutual Warehousing and Security Company (hereafter called the warehouse company) was a corporation of the State of New York, incorporated by act, chapter 701 of the Laws of New York for 1872. By virtue of said act the said corporation possessed all the general powers and privileges, and was subject to all the liabilities, conferred and imposed upon corporations organized under and in pursuance of an act passed February 17th, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes." where the provisions thereof are not inconsistent with the express provisions of the said charter of the warehouse company, which act of February 17th, 1848, (together with the act extending and amending the same), was in force during all of said times.

The said warehouse company never made, published or filed any of the reports required by section 12 of said act of February 17th, 1848.

The defendant was a trustee, and Robert Squires was president of said warehouse company during all of the times referred to, and said Remsen was such trustee until at least May 28th, 1881.

29 Second. At the times hereinafter mentioned, Squires, Taylor & Company were a firm doing business in the city of New York as copartners.

It was composed of Robert C. Squires (a son of the president of the warehouse company), Charles E. Taylor and Burnett Forbes.

On the 11th day of September, 1878, the firm of Squire-, Taylor & Company made their promissory note to the order of themselves for the sum of $12,000, in the form of the notes set forth in the complaint herein, and on the 27th day of November, said firm made a promissory note, in the same form, for the sum of $4,000. Both of said notes were payable in four months after date.

On the 11th day of September, 1878, said note for $12,000, dated on that day, was discounted by the plaintiffs before maturity and in

the regular course of the plaintiffs' business, and in good faith, and at the legal rate of interest.

On the 27th day of November, 1878, the one of said notes dated on said day, was discounted by the plaintiffs in the regular course of the plaintiffs' business, and in good faith, and at the legal rate of interest.

At the time of said discounts, both said notes were endorsed by the makers and payees (Squires, Taylor & Company), in blank, and, after the endorsement of said makers and payee, were endorsed by the warehouse company, in the following form, to wit:

The German-American Mutual Warehouse and Security Company.
Robert Squires, President.

Both said notes were thus discounted for Squires, Taylor & Company, the makers and payees thereof, and at the maturity of each of them respectively, they were duly presented for payment to said makers, and payment was demanded and refused, whereupon due notice of such presentments, demands and refusals to pay, was, in each case, duly given to said warehouse company, two notices as to each of said notes being duly mailed by the notary, one thereof being directed, "German-American Mutual Warehousing and Security Company, Robert Squires, president, 45 Broad street, New York city, N. Y.," (said 45 Broad street then being the office of the warehouse company), and the other bearing the same direction in every particular except that the words and figures "45 Broad street" were omitted.

Third. Said notes were not fully paid at maturity by anybody, but out of tobacco pledged by said Squires, Taylor & Co. as collateral security therefor at the time of the discounts, the plaintiffs collected such a sum that there is now due, and was due when this action was begun, upon the one of said notes which is dated, and was discounted, on September 11th, 1878, the sum of $10,086.99 with interest thereon from May 7th, 1879, and upon the one of said notes dated and discounted on November 27th, 1878, the sum of $2,554.64 with interest from May 7th, 1879.

Said two notes have not been paid in whole or in part except as aforesaid.

Fourth. Prior to the discount of the two notes above mentioned, and involved in this action, said firm of Squires, Taylor & Co. beginning on November 16th, 1876, procured the plaintiffs to discount twenty-one other notes made and endorsed in exactly the same form in all respects, as the two notes above mentioned and involved in this action, which said twenty-one notes aggregated the sum of $190,000.

The directors of the warehouse company did not know of the making or endorsing of said twenty-one notes above mentioned, or the two notes involved in this action—but all said notes were entered upon the book of "Bills payable" of the warehouse company, as obligations of the warehouse company.

All said twenty-one notes made, endorsed and discounted prior

to the discount of the two notes involved in this action, were paid at maturity by the makers, except one of said notes which was dated on September 2d, 1878, and discounted by the plaintiffs on September 11th, 1878, and one thereof dated on August 27th, 1878, and discounted by the plaintiffs on the same day, which last two mentioned notes were paid from the proceeds of tobacco de-
31 posited by the makers of said notes as collateral security therefor, at the time of the discount thereof.

Fifth. At the beginning of said line of discounts of said Squires, Taylor & Co. notes, Robert Squires, the president of said warehouse company, and a director of plaintiffs' bank, arranged for, and prepared for, said discounts for Squires, Taylor & Company of said notes, by recommending the officers of the plaintiffs' bank to make said line of discounts.

Sixth. Prior to the discount by the plaintiffs of the two notes, dated September 11th and November 27th, 1878, respectively, which are involved in this action, the plaintiffs had discounted, upon the application of said Robert Squires, president of said warehouse company, thirty-five promissory notes, aggregating $192,643.75, which thirty-five notes were made by one or the other of the directors of said warehouse company, to the order of Robert Squires, president (meaning the president of said warehouse company).

Said thirty-five notes were endorsed by said Robert Squires, president, and procured to be discounted by him by the plaintiffs, with and by the knowledge, approval and authority of the directors of said warehouse company.

Seventh. All said notes of Squires, Taylor & Company, including the said two notes of September 11th and November 27th, 1878, which are involved in this action, were discounted by the officers of the plaintiffs, "between boards," that is to say, they were discounted by the officers of the bank, (and not by the directors), in pursuance of a by-law of the said bank, which reads as follows:

"Article 5, page 4. Loans and discounts may be made daily, under the direction of the board, by the officers of the bank or a by a committee duly appointed; such loans and discounts to be reported to the board at their next meeting thereafter. A book shall be kept for the purpose of recording such loans and discounts, with a list of the securities taken for such loans, to be open at all times for the directors' inspection. Loans made between boards by the officers shall always be confined to commercial paper or interest-paying public or corporate stocks."

32 At a meeting of the plaintiffs' board of directors which was held on September 13th, 1878, which was the meeting of said directors which next followed the discount of said note of September 11th, 1878, said minutes contained the words "bills discounted and the board adjourned."

Robert Squires, a director of the plaintiffs, was present at said meeting.

At the meeting of the plaintiffs' board of directors which was held on November 29th, 1878, which was the meeting of said directors which next followed the discount of said note of November

27th, 1878, said minutes contain the words, "discounts approved and done, and the board adjourned."

Robert Squires, a director of the plaintiffs, was not present at said meeting.

Eighth. The one of the notes involved in this action, which was dated and discounted on September 11th, 1878, was discounted by the plaintiffs' officers, under said by-law, on the day of its date, and at the next meeting of the board of directors of said bank, which was held on September 13th, 1878, the words stated in the last preceding finding, appear on the minutes of said directors' meeting as is stated in the last preceding finding.

The other of the two notes involved in this action, to wit, that dated and discounted on November 27, 1878, was discounted by the plaintiffs' officers under said by-law, and at the next meeting of the board of directors of said bank, which was held on November 29th, 1878, the words stated in the last preceding finding, appear on the minutes of said directors' meeting as is stated in the last preceeding finding.

Ninth. Upon endorsing the above-mentioned notes of Squires, Taylor & Co., as above mentioned, Robert Squires, the president of the warehouse company, received from said Squires, Taylor & Company, as commissions for such endorsements, one-fourth of one per cent. per month upon the paper so endorsed—which, as such paper ran for four months, amounted to one per cent. upon the face of such paper.

33 The aggregate of such commissions amounted to about $2,000, which was received by said Squires, and the receipt whereof was entered upon the books of said warehouse company.

The directors of said warehouse company never knew of the endorsements of the paper of Squires, Taylor & Company by said Robert Squires, president, or of the receipt of such commissions—but entries of these transactions appeared upon the books of the warehouse company.

Such commissions went into the treasury of the warehouse company, and said company never has at any time repaid, or offered to repay, said commissions, or any part thereof, to said Squires, Taylor & Company, or to the plaintiffs, or to any person, firm or corporation whatsoever.

Tenth. When the plaintiffs' bank discounted the two notes involved in this action, and the twenty-one notes of the same form previously discounted as above mentioned, it received from said Squires, Taylor & Company, in addition to the statements made in said notes as they appear in the complaint, as collateral security for such notes, warehouses receipts, of amounts reasonably proportionate to the amount of notes, which warehouse receipts were in the following form:

National Tobacco Inspection.

German-American warehouses, Partition and Van Dyke Sts., Brooklyn. Offices: Foot of Partition St., Brooklyn, and 109 Pearl St., N. Y.

——— —, 188-.

Warehouse No. —.

	Inspection No.	Gross.	Tare.	Nett.
Berry & Bryan.				

Received for inspection one hogshead of tobacco, mark, number and weight as per margin, which, on payment of charges, will be delivered to bearer.

BERRY & BRYAN,
Inspectors.

Said Berry and Bryan, who signed said warehouse receipts as in-
inspectors, were, at the time of the discount by the plaintiffs
34 of the two notes in controversy in this action, the lessees of the warehouses of said warehouse company.

Said warehouse company leased its warehouses in November, 1876.

Said warehouse company received, as rent under such leasing, from the lessess of the warehouse, all the storage fees by way of rent, and after such leasing, the lessees (said Berry and Bryan being such lessees at the time of the discounting of the two notes involved in this action), were in the habit of using the name of said warehouse company's stores in their warehouse receipts for property stored therein, which was done with the knowledge and by the authority of said warehouse company, and warehouse receipts for tobacco, made in that form and way, were deposited with the plaintiffs' bank as collateral security on the discount of said Squires, Taylor & Co's notes; such tobacco being then stored in the warehouses mentioned in such warehouse receipts.

Eleventh. After the leasing by said warehouse company of its warehouse, said warehouse company and its directors turned over the whole conduct of their business to said Robert Squires, president, and the directors held no meetings unless summoned by said Squires, president, and said Squires, president, alone had charge of the safe and office of said warehouse company, and he alone had the conduct of its business, and after such leasing, said Robert Squires, president, with the knowledge and approval of, and by the authority of, the directors of said warehouse company, endorsed as such president, and procured the discount thereof by the plaintiff, of the notes mentioned in the preceding sixth finding, and attended generally to the financial business of said warehouse company, including the discounts by the plaintiffs of the Berry and Bryan and Hoodless &

Company notes, and various notes given to raise money to pay the taxes and assessments of the warehouse company, and paid the rent of the offices occupied by said company, and generally attended to the financial and other affairs of said warehouse company.

Twelfth. On the 1st of December, 1884, the plaintiff in this action recovered a judgment in the superior court of the city of New York against said warehouse company upon the balance of the two notes involved in this action and mentioned in these findings, for
35 the sum of $19,278.99, of which $2,517.47 were the costs and disbursements of this action.

This judgment, upon an appeal therefrom by said warehouse company, was affirmed by the general term of said superior court upon the 10th day of June, 1886, and the opinion of the court, upon such affirmance, is reported in volume 53, of the Superior Court Reports of the City of New York (Jones and Spencer's reports), at page 367.

Said warehouse company then appealed to the court of appeals of the State of New York, from said judgment of affirmance, and said judgment was, on the 8th of October, 1889, reversed by said court of appeals, and the opinion of said court upon such reversal, is reported at page 281 of volume 116 of the Court of Appeals Reports of the State of New York.

The said opinions are to be referred to as part of this finding.

Thirteenth. On the 2d day of December, 1884, an execution against said warehouse company upon said judgment recovered against it on December 1st, 1884, as stated in the preceding finding, was issued against said warehouse company, which execution was returned wholly unsatisfied.

After the return of said execution unsatisfied, and on or about the 13th day of March, 1885, this plaintiff brought an action, in said superior court, against William Remsen, the defendant in this action, to hold him liable, as a stockholder of said warehouse company, under section 10, of said act of February 17th, 1848.

On July 3d, 1886, a judgment was entered in said action against this defendant, as a stockholder of said warehouse company, for the sum of $21,706.71.

This judgment was reversed by the general term of said superior court, and the opinion of said general term is reported in volume 55 of the Superior Court Reports (Jones and Spencer), at page 144.

The plaintiff appealed to the court of appeals in that action (after a new trial had been had and judgment rendered for the defendant), but said appeal and the questions involved therein, were not decided by the court of appeals, because that court reversed the judgment, as above stated, against the warehouse company, upon which the liability of William Remsen, the defendant in that action, depended.

Said opinions are to be referred to as a part of this finding.

36 I find the following conclusions of law:

First. The endorsements in question were accommodation endorsements.

Second. The warehouse company had no power under its charter to make these accommodation endorsements.

Third. The presentation of their own notes by the makers, to be discounted for their own benefit, and accompanied by their own collateral, to the plaintiff, was notice to the discounting bank that the endorsements of a third party thereon were made for the accommodation of the makers and holders of the notes.

Fourth. The liability sued upon, was not a debt of the company, of which the defendant was a trustee, and he cannot be held liable therefor.

Fifth. Judgment must be for the defendant with costs, and the above findings of fact and conclusions of law are hereby included in the decision herein filed July 21st, 1890.

ALFRED C. COXE, *U. S. J.*

(Endorsed:) Circuit court U. S., south. dist. N. Y. The National Park Bank of New York *vs.* William Remsen. Findings of fact and conclusions of law. U. S. circuit court. Filed Dec. 18, 1890. John A. Shields, clerk.

37 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

The issues in this action having been regularly brought on for trial before Mr. Justice Coxe at a circuit of this court held in the United States court-house, New York city, on the 23rd day of April, 1890, and a trial by jury having been duly waived by a written consent of all parties, duly filed, and the court having heard the allegations and proofs of the parties, and having listened to the argument of Francis C. Barlow, of counsel on behalf of the plaintiff, and of William H. Ingersoll, of counsel on behalf of the defendant, and due deliberation having been had thereon, and a decision having been duly made by the court in favor of the defendant and filed on the 21st day of July, 1890, and findings of fact and conclusions of law, containing a statement of the facts found and the conclusions of law thereon, having been made and signed by the court and filed on the 18th day of December, 1890, and the defendant's costs having been duly adjusted at $13.75, now, on
38 motion of William H. Ingersoll, attorney for the defendant, it is adjudged that the plaintiff's complaint be, and the same hereby is, dismissed upon the merits, and that the defendant do recover of the said plaintiff the sum of $13.75, the costs and disbursements of this action.

ALFRED C. COXE, *U. S. J.*

The entry of the foregoing judgment is hereby consented to. Dated January 5th, 1891.

BARLOW & WETMORE,
Plaintiff's Attorney-.
WM. H. INGERSOLL,
Defendant's Attorney.

Judgment signed this seventh day of January, A. D. 1891.
JOHN A. SHIELDS, *Clerk.*

(Endorsed :) Circuit court of the United States for the southern district of New York. National Park Bank of New York against William Remsen. Judgment-roll. H. H. M. William H. Ingersoll, attorney for defendant, 170 Broadway, N. Y. U. S. circuit court. Filed Jan. 7th, 1891. John A. Shields, clerk.

39 United States Circuit Court, Southern District of New York.

THE NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

At law. Tried by the court.

Francis C. Barlow, for the plaintiff.
William H. Ingersoll, for the defendant.

COXE, *J.:*

This action is to recover of the defendant, as trustee of the German-American Mutual Warehousing and Security Company, the amount due upon two notes endorsed by it, upon the ground that the trustees are liable for the debts of the corporation because no annual report of its financial condition was filed, as required by the general manufacturing act of 1848. Section 12 provides that for failure to file the trustees "shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made." N. Y. Rev. Stats., 8th ed., vol. 3, p. 1957.

First in the order of proof it is necessary for the plaintiff to establish that the amount in question was a debt of the corporation. If it was not a debt of the corporation, of course, the trustees are not liable.

40 In October, 1889, the court of appeals of New York, in an action brought against the warehousing company upon these identical notes, held that there was no liability for the reason that an accommodation indorsement by the warehousing company was *ultra vires*, and that the plaintiff was chargeable with notice of the character of the indorsement because the notes were presented for discount by the makers who received the avails thereof (National Park Bank *vs.* G. A. M. W. & S. Co., 116 N. Y., 281). This decision sets at rest forever the question of the liability of the warehousing company upon these notes. They can never be enforced against that

company, and it is certainly a grave question whether, in any view, a trustee can be held upon an obligation from which his corporation is in fact released; but the highest tribunal of this State has decided that the notes never were an obligation of the warehousing company. In order to hold the defendant liable it is necessary for this court to disregard that decision. Although the power to do this may be conceded, it is only in exceptional cases where there is a conflict between Federal and State authority or where important public considerations are at issue that it should be exercised. Even where the question is one of general commercial law, considerations of comity and the orderly administration of justice are against the assertion of the power. No decision of the Supreme Court of the United States or of the circuit court of this circuit is cited which conflicts with the rule of the court of appeals, and were
there a likelihood that the doctrine contended for by the
41 plaintiff would ultimately be accepted by the United States
courts it is, in the circumstances referred to, appropriate and decorous that the Supreme Court of the United States and not the circuit court should pronounce the judgment of dissent.

Although the foregoing considerations are sufficient to dispose of the case, I have examined the questions involved in the decision of the court of appeals and the authorities cited to sustain the propositions of law there enunciated in the light of the able and elaborate brief submitted for the plaintiff and am constrained to say that I see no reason to anticipate a conflict of authority upon these questions.

The argument is plain, and, if the premises are correct, is conclusive.

First. The indorsements were accommodation indorsements.

Second. The warehousing company had no power under its charter to make these indorsements.

Third. A party who discounts such paper cannot recover of the indorser if he has knowledge of the fact that the indorsement was made for the accommodation of the maker.

Fourth. Where the makers of the note presented for discount it is notice to the discounter of the charater of the indorsement.

The first of these propositions is supported by the proof, the others are, it is thought, amply sustained by authority. They are reaffirmed.

Every fact necessary to the decision was considered by the court
of appeals. The circumstance that a consideration was paid
42 for the indorsements was not overlooked. It is three times
referred to in the opinion, and the conclusion reached that the warehousing company had no power "to bind itself by making or indorsing the promissory notes for the accommodation of the makers for a consideration paid."

Nor was the court in error in holding that the plaintiff had notice of the fact that the notes were not indorsed in the usual course of business. The presentation for discount by the makers was something more than a suspicious circumstance. There was notice direct and explicit upon the notes themselves that the indorsements

were invalid. The discounter when confronted with such facts cannot protect himself by inaction. If there is a possible explanation he must seek it; but where, as in this case, nothing of the kind is required, and no statement is made inconsistent with the plain provisions of the notes, the unerring presumption attaches.

As the non-liability of the warehousing company defeats the plaintiff's action at the threshold, it is, of course, unnecessary to pass upon the difficult but interesting questions relating to the liability of the defendant as trustee.

There must be a judgment for the defendant.

NOTE.—In reply to a suggestion of the plaintiff's brief it is proper to state that it is not the custom of this court to follow the practice which sometimes obtains in the State courts of making elaborate findings *ad infinitum*. Although I think such practice unnecessary and cumbersome, I am disposed to adopt any reasonable course which the counsel for the plaintiff deems essential to enable
43 him to present fully to the Supreme Court the questions here decided.

It would seem, speaking generally, that a statement similar to the one which precedes the opinion of the court of appeals, supplemented, perhaps, by the additional facts that the defendant was a trustee of the warehousing company, and that no reports were filed by it, together with the conclusions of law reached by the court of appeals, would be sufficient.

The findings, etc., had better be submitted to the attorneys for the plaintiff before being presented for signature.

A. C. C.

(Endorsed:) United States cir. court, southern district of New York. The National Park Bank of New York *vs.* William Remsen. Decision. Coxe, J. U. S. circuit court. Filed Jul-21, 1890. John A. Shields, clerk.

44 Supreme Court of the United States.

NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN.

Assignment of Errors.

Afterwards, to wit, on the second Monday of October, 1891, at the October term for the year 1891 of the Supreme Court of the United States, at the Capitol at the City of Washington, in the District of Columbia, comes the said National Park Bank of the City of New York, by Francis C. Barlow, its attorney, and says that in the record and proceedings in the above entitled action there is a manifest error in this, to wit:

1. That the circuit court of the United States for the southern district of New York erred in finding as a conclusion of law upon

the findings of fact made herein that the endorsements upon the notes involved in this action were accommodation endorsements.

2. That the circuit court of the United States for the southern district of New York erred in finding as a conclusion of law upon the findings of fact made herein that the German-American Warehousing & Security Company had no power under its charter to make the endorsements upon the notes aforesaid.

45 3. That the circuit court of the United States for the southern district of New York erred in finding as a conclusion of law upon the findings of fact made herein that the presentation of their own notes by the makers to be discounted for their own benefit and accompanied by their collateral to the plaintiff was notice to the discounting bank, the plaintiff in this action, that the endorsements of a third party thereon were made for the accommodation of the makers and holders of the notes.

4. That the circuit court of the United States for the southern district of New York erred in finding as a conclusion of law upon the findings of fact made herein that the liability sued upon was not a debt of the German-American Mutual Warehousing & Security Company, of which the defendant was a trustee, and that he cannot be held liable therefor.

5. That the circuit court of the United States for the southern district of New York erred in finding as a conclusion of law upon the findings of fact made herein that judgment must be for the defendant in this action with costs.

6. That the findings of fact as found by the circuit court of the United States for the southern district of New York do not support and justify the judgment of the said court in this action, made and entered herein on the 8th day of January, 1891.

46 7. That the circuit court of the United States for the southern district of New York erred in not rendering judgment in favor of the plaintiff, The National Park Bank of New York against the defendant, William Remsen, upon the facts as found with costs and disbursements of this action.

Wherefore the said National Park Bank of New York prays that the judgment of the said circuit court of the United States for the southern district of New York, entered herein on the 8th day of January, 1891, be reversed, and that the said circuit court of the United States for the southern district of New York be directed to enter judgment in the above-entitled action in favor of the plaintiff and against the defendant for the relief demanded in the complaint therein, together with the costs and disbursements of said action.

FRANCIS C. BARLOW,
Attorney for Plaintiff in Error, No. 36 Wall Street, New York City, N. Y.

(Endorsed:) Supreme Court of the United States. National Park Bank of New York *vs.* William Remsen. Assignment of errors. Francis C. Barlow, attorney for pl'ff in error, 36 Wall St., N. Y. city. U. S. circuit court. Filed Jul- 21, 1891. John A. Shields, clerk.

47 Supreme Court of the United States.

THE NATIONAL PARK BANK OF NEW YORK, Pl'ff in Error,
ag'st
WILLIAM REMSEN, Def't in Error.

Joinder in Error.

And afterwards, to wit, on the second Monday of October, 1891, at the October term for the year 1891 of the Supreme Court of the United States, at the Capitol, at the city of Washington, in the District of Columbia, the said William Remsen, by Herbert T. Ketcham, Esq., his attorney, freely comes into court and says that there is no error, either in the record or proceedings aforesaid, and he prays that the Supreme Court of judicature before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as to the alleged errors assigned, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, with costs and disbursements herein to the appellee, the def't in error.

N. Y., Sept. 26, 1891.

H. T. KETCHAM,
Att'y for Def't in Error, 170 *Broadway, N. Y. City.*

To James H. McKenney, Esq., clerk U. S. Sup. Ct. Barlow & Wetmore, Esqrs., att'ys for pl'ff in error, and John A. Shields, Esq., cl'k of U. S. circuit ct., S. dist. of N. Y.

48 (Endorsed:) Supreme Court of the United States. The National Park bank, pl'ff in error, ag'st William Remsen, def't in error. Joinder in error. Sept. 26, 1891. H. T. Ketcham, att'y for def't in error. To John A. Shields, Esq., cl'k U. S. circuit ct., S. dist. of N. Y. U. S. circuit court. Filed Sept. 28, 1891. John A. Shields, clerk.

49 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

NATIONAL PARK BANK OF NEW YORK
vs.
WILLIAM REMSEN. } Bond for Damages and Costs.

Know all men by these presents that we, National Park Bank of New York, Francis C. Barlow and Charles W. Wetmore, are held and firmly bound unto the above-named William Remsen in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said William Remsen; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the second day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named National Park Bank of New York has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named National Park Bank of New York shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall
50 be void; otherwise the same shall be and remain in full force and virtue.

NATIONAL PARK BANK OF N. Y., [SEAL.]
By GEO. S. HICKOK, *Cashier.*
FRANCIS C. BARLOW. [SEAL.]
C. W. WETMORE. [SEAL.]

Sealed and delivered and taken and acknowledged this third day of January, 1891, before me—

GEO. W. WEIFFENBACH,
[SEAL.] *Notary Public* (*No.* 141), *New York County.*

UNITED STATES OF AMERICA, }
Southern District of New York. } *ss:*

Francis C. Barlow, being duly sworn, deposes and says that he is worth the sum of five hundred ($500.00) dollars over and above all his just debts and liabilities.

FRANCIS C. BARLOW.

Sworn to this third day of January, A. D. 1891, before me—

GEO. W. WEIFFENBACH,
[SEAL] *Notary Public* (*No.* 141), *New York County.*

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Charles W. Wetmore, being duly sworn, deposes and says that he is worth five hundred ($500.00) dollars over and above all his just debts and liabilities.

CHARLES W. WETMORE.

Sworn to this third day of January, A. D. 1890, before me—

GEO. W. WEIFFENBACH,
[SEAL.] *Notary Public* (*No.* 141), *New York County.*

(Endorsed:) U. S. circuit court, southern district of New York. National Park Bank of New York *vs.* William Remsen. Bond for costs on writ of error to Supreme Court of United States. The within bond is hereby approved as to form, amount, and sufficiency of the sureties. N. Y., January 8, 1891. E. Henry Lacombe. U. S. circut court. Filed Jan. 8, 1891. John A. Shields, clerk.

51 UNITED STATES OF AMERICA, *ss:*

To William Remsen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The National Park Bank of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated January 8th, 1891.

E. HENRY LACOMBE.

52 [Endorsed:] E. & A. A. 958. U. S. Supreme Court. National Park Bank of New York, plaintiff in error, against William Remsen, defendant in error. Citation. Barlow & Wetmore, attorneys for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 8 day of January, 1891. Wm. H. Ingersoll, attorney for defendant in error. 20 pd. U. S. circuit court. Filed Jan. 9, 1891. John A. Shields, clerk.

Endorsed on cover: Case No. 14,885. S. New York C. C. U. S. Term No., 316. The National Park Bank of New York, plaintiff in error, *vs.* William Remsen. Filed October 10th, 1891.

15-8-331

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

316

NATIONAL PARK BANK OF NEW YORK,
Plaintiff in Error,

against

WILLIAM REMSEN,
Defendant in Error.

ARGUMENT OF PLAINTIFF IN ERROR.

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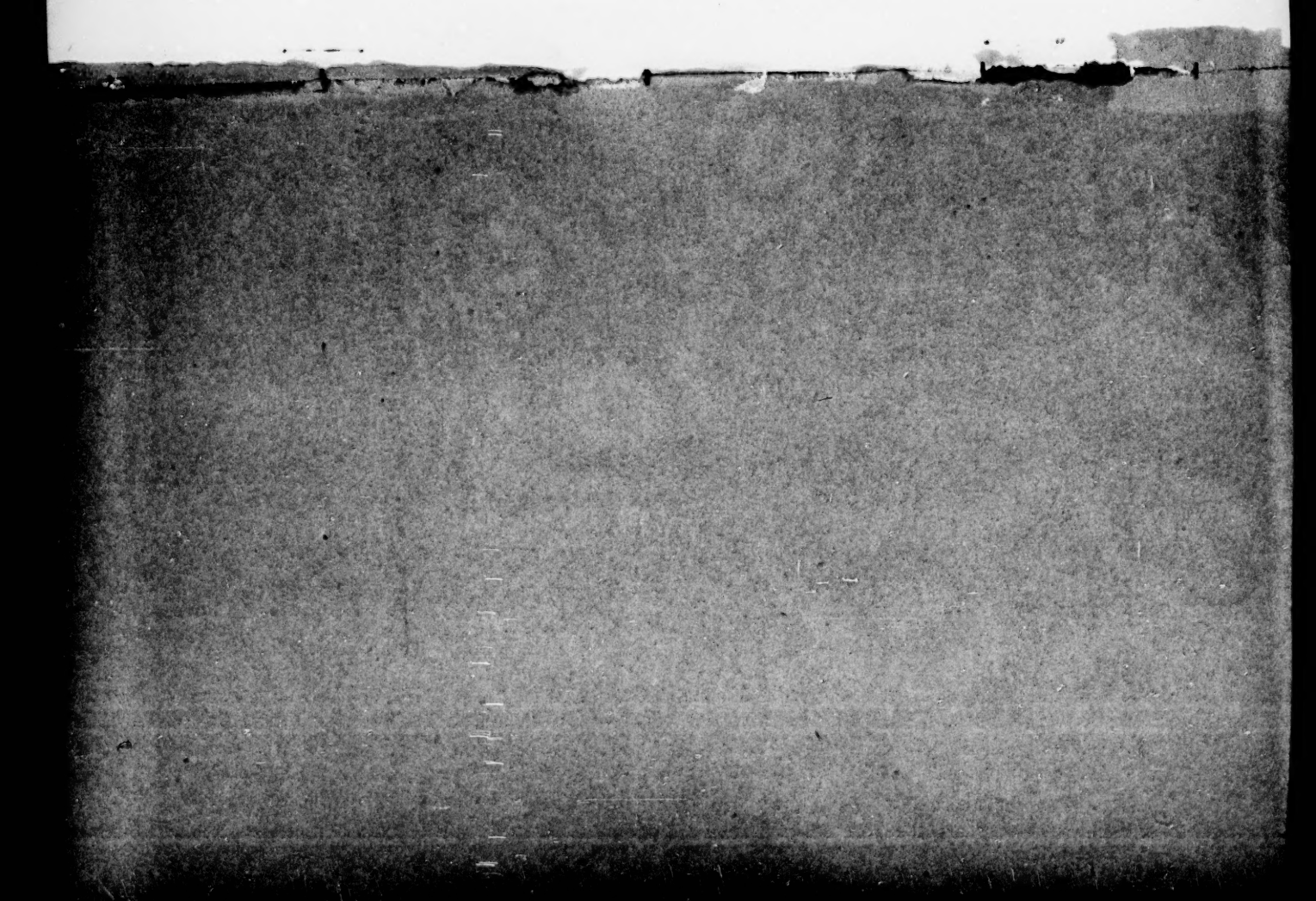


Supreme Court of the United States.

NATIONAL PARK BANK OF NEW YORK,
Plaintiff in Error,

AGAINST

WILLIAM REMSEN,
Defendant in Error.

ARGUMENT OF THE PLAINTIFF IN ERROR TO SUPREME COURT OF THE UNITED STATES.

Statement of the Case.

This is a writ of error from a judgment entered in favor the defendant in the Circuit Court of the United States for the Southern District of New York dismissing the complaint of the plaintiff.

The plaintiff sued the defendant to recover the unpaid balances of two notes made by the firm of Squires, Taylor & Co. and endorsed by The German American Mutual Warehousing and Security Company, (which, for the sake of brevity, will be hereafter referred to as the Warehouse Company).

The defendant was a trustee of the Warehouse Company, which was a New York corporation incorporated under a special act, Chapter 701 of the Laws of New York for 1872.

By the terms of the act, Chapter 701, the Warehouse Company possessed all the general powers and privileges, and was subject to all the liabilities of corporations organized under what is known as the Manufacturing Act, being act, Chapter 40, Laws of New York for 1848, and the amendments thereof, so far as its provisions were not inconsistent with the express provisions of the Warehouse Company's charter, *i. e.* Chapter 701.

(Transcript of Record, p. 14. First Finding.)

By the terms of Section 12 of the Manufacturing Act the trustees of a corporation formed thereunder must, within twenty days of the 1st of January in each year, make, file and publish a report setting forth the amount of capital actually paid in, and the amount of the debts of the corporation. In case the trustees fail to make, file and publish such a report, the statute further provides, that the trustees "shall be jointly and severally liable for "all the debts of the company then existing and for all "that shall be contracted before such report shall be "made."

The Trustees of the Warehouse Company never made, published or filed any of the reports required by this Section 12 of the Manufacturing Act.

(Transcript of Record. First Finding, p. 14.)

The defendant was a trustee of the Warehouse Company continuously from the time the notes were made down to at least May 28th, 1881, after this action was begun.

(Transcript of Record. First Finding, p. 14.)

This action seeks to enforce the liability imposed upon the defendant for the failure to comply with Section 12 of the Manufacturing Act.

The two notes upon which this suit is brought are as follows:

1. A note for $12,000 dated September 11th, 1878, made by the firm of Squires, Taylor & Company to their own order payable four months after date.

2. A note for $4,000 dated November 27th, 1878, made by the firm of Squires, Taylor & Company to their own order payable four months after date.

Both of these notes were discounted by the plaintiff for the firm of Squires, Taylor & Company on the days upon which they were respectively dated.

When they were thus discounted they bore the endorsement of Squires, Taylor & Company, and of the Warehouse Company, the latter's endorsement being in the following form:--

"The German American Mutual Warehouse and Security Company.

ROBERT SQUIRES, President."

(Transcript of Record. Second Finding, pp. 14 & 15.)

Pledged to secure the payment of these two notes were certain hogsheads of tobacco.

The Warehouse Company received no part of the proceeds of these discounts, but was paid for its endorsement commissions aggregating in amount the sum of $2000, being at the rate of one fourth of one per cent per month

(Transcript of Record. Ninth Finding, p. 17.)

In addition to the commission, the tobacco pledged against the notes was stored in the Warehouse Company's storehouse, which it had leased to the firm of Berry & Bryan, taking all of the storage charges by way of rental.

(Transcript of Record. Tenth Finding, pp. 17 & 18.)

So that the Warehouse Company received as considerations for the endorsements both the commissions and the storage charges on the tobacco.

When the notes fell due they were duly presented for payment and payment was demanded and refused. They were then duly protested and the proper notices given to hold the endorsers thereon.

(Transcript of Record. Second Finding, p. 15.)

By the sale of the tobacco, pledged as collateral for the payment of the notes, certain portions of the same were paid, so that there still remained due on the note dated September 11th, 1878, the sum of $10,086.99, and on the note dated November 27th, 1878, the sum of $2,554.64, with interest on both of said sums from May 7th, 1879. No part of these sums has ever been paid.

(Transcript of Record. Third Finding, p. 15.)

The firm of Squires, Taylor & Company was composed of Robert C. Squires, Charles S. Taylor and Burnett Forbes.

Robert C. Squires was a son of Robert Squires, the president of the Warehouse Company.

Heretofore the plaintiff sued the Warehouse Company upon these two notes in the Superior Court of the City of New York, and on the 1st day of December, 1884, obtained a judgment against the defendant which judgment was affirmed by the General Term of that Court. An appeal was then taken to the Court of Appeals of the State of New York, where the judgment was reversed and a new trial ordered. The action was thereupon discontinued by the plaintiff, and was not tried again.

This decision of the Court of Appeals is found in 116 New York Reports, page 281.

(Transcript of Record. Twelfth Finding, p. 19.)

This action was begun by the service of the summons and complaint on the defendant on the 10th day of January, 1881.

(Transcript of Record, p. 8.)

On the 23rd day of April, 1890, it was tried before the Honorable A. C. Coxe without a jury, a jury having been waived by stipulation.

(Transcript of Record, pp. 13 and 20.)

On July 21st, 1890, Judge Coxe filed an opinion holding that there must be a judgment in favor of the defendants, basing his decision on the same general grounds as held by the Court of Appeals of New York in the suit against

the Warehouse Company, above referred to, namely that the fact of the notes having been discounted for the makers was notice that the endorsements of the Warehouse Company were for accommodation solely, that a corporation cannot endorse or make paper for accommodation, and that the plaintiff having notice could not recover; and on the further ground that if the ruling of the Court of Appeals is to be disregarded the dissent should come from the Supreme Court of the United States rather than the Circuit Court.

In deciding this case Judge Coxe made, at the request of counsel for the plaintiff, special findings under Section 649 of the U. S. Revised Statutes, and it is to the sufficiency of the facts so found to support the judgment that the plaintiff excepts under Section 700 of the Revised Statutes, and upon which it bases the present writ of error.

endorsements, or else

c. That the plaintiff was a *bona fide* holder, without notice and before maturity, and as such can enforce the

company's liability as endorser even though the endorsements were for accommodation.

C. That the defendant, under the Charter of the Warehouse Company, is liable for the debts of the Company, as a trustee on the ground that Section 12 of the Manufacturing Act applies to the trustees of the Warehouse Company, and that no annual reports of the latter company were made, filed or published by its trustees as required by said act.

ARGUMENT OF PLAINTIFF

As preliminary to the main argument of the plaintiff in error, it desires to emphasize the fact that the only facts which can be in any way considered, as supporting the judgment of the Circuit Court, are the facts found by the Judge at pages 15 to 20, both inclusive, of the Transcript of the Record.

On these facts the judgment must stand or fall.

There were no exceptions taken during the course of the trial, and the only questions which can be considered by this Court are whether or not the facts, which the judge below found in his special findings, are sufficient to support the judgment of that Court.

No reference to the evidence can be had and no argument can be based thereon.

The statute and the cases, decided thereunder by this Court, are very clear on this point.

They are briefly as follows:—

U. S. R. S., Section 649, provides that the issues of fact in any civil action may by stipulation be tried and determined by the Court without a jury. In which case the findings may be either general or special.

U. S. R. S., Section 700, provides that where the finding is special the review "may extend to the determination "of the sufficiency of the facts found to support the "judgment."

The facts found are conclusive, and cannot be questioned.

Ryan *vs.* Carter, 93 U. S., 78, at p. 81, where the Court says: "The Court below, by stipulation, tried the case

" and made a special finding of facts, on which it based
" its conclusions of law, that the plaintiffs could not re-
" cover. It is objected that some of these facts were not
" warranted by the evidence; but this is *not* a *subject* of
" *inqury here*. If the parties chose to adopt this mode of
" trial, they are concluded by the propositions of fact
" which the evidence, in the opinion of the Court, estab-
" lishes. Whether general or special the finding has
" the same effect as the verdict of a jury; and its *suffi-*
" *ciency* to *sustain* the *judyment* is the *only* matter of
" *review* in this *Court*."

Morris *vs.* Jackson, 9 Wallace, 125, at bottom of p. 127.

In its argument, therefore, the plaintiff will confine itself strictly to the facts as found, and to their sufficiency to support the conclusions of law which the Court based thereon.

The plaintiff insists that the evidence taken below cannot be referred to or considered in any way.

For convenience in referring thereto, the following points are numbered consecutively without reference to the main heads which are designated by the letters of the alphabet.

POINTS.

A.

THE DECISION OF THE NEW YORK COURT OF APPEALS IS NOT BINDING UPON THE PARTIES TO THE CASE AT BAR.

First.

Before going into a discussion of the main questions involved in the case at bar it is necessary to show that this

Court is not bound by the decision of the Court of Appeals of New York, which decided that the Warehouse Company was not liable upon the endorsements in question.

(National Park Bank *vs.* The German-American Mutual Warehousing and Security Company, 116 N. Y., 281.)

Of course, if this Court is bound by that decision, then the notes are not debts of the Warehouse Company, and are consequently not a *liability* of the company for which a trustee can be held under Section 12 of the Manufacturing Act, and this action would necessarily fail.

Of course, this Court may yield to the *reasoning* of the Court of Appeals, – but there *is* no *reasoning* in the Opinion of that Court.

There is no question of *res judicata* involved.

Of course, if the question of the liability of the Warehouse Company on these endorsements were *res judicata in this action*, that would be the end of our case. But *res judicata*, is neither *pleaded* or *pretended* in this action, and it is incumbent upon the defendant to plead and prove such a defense. And if it *were pleaded*, it would fail, because it is not *proved*, for two reasons:

First.—There is nothing to show that a judgment was ever entered against the plaintiff (as a matter of fact, no judgment ever was entered).

The Court of Appeals simply reversed the judgment and ordered a new trial.

(Transcript. Twelfth Finding, p. 19).

As there was no judgment, there can be no question of *res adjudicata.*

A citation of authorities on this point would be unnecessary.

So far as the question of *res adjudicata* is concerned, there is therefore no reason why the plaintiff should not again sue the Warehouse Company in the courts of the State of New York.

Second.—But if there *had been* a judgment against the plaintiff in the action against the Warehouse Company, that judgment would not bar the plaintiffs or protect the defendant in this action.

Judgments bind only "parties and privies."

The defendant Remsen was not a "party" to the action against the Warehouse Company.

Nor was he a "privy," as has been decided by our Court of Appeals.

Miller against White, 50 N. Y., 137, was an action precisely like that at bar,—that is, it was an action brought by a creditor of a Manufacturing Corporation, against a trustee of the Corporation, for failing to file an annual report—which is the action which we bring against this defendant, under Section IX. of the Charter of the Warehouse Company and Section 12 of the Manufacturing Act.

In Miller against White, the plaintiff had previously recovered a judgment against the Corporation, for the debt with which he charged the defendant as trustee—and the plaintiff there claimed that that judgment bound the trustee, as to the indebtedness of the Corporation. But the Court of Appeals held that the trustee was not a "privy" to a judgment against his Corporation, (and it was not pretended that he was a *party*, although the Court held that he was *not*), and, therefore, that the judgment against the *Corporation* did not bind him.

The plaintiff was compelled to prove the indebtedness of the Corporation *de novo*, as we have done in this action against the defendant William Remsen.

As the plaintiff in *this* action could not claim that a judgment which held that the Warehouse Company *was* liable established such liability as against this defendant; so the defendant in this action could not claim that a judgment that the Warehouse Company *was not liable protects* him.

The ground of the decision in Miller *vs.* White, was that a trustee is "neither a party or a privy" to an action against a Corporation, and, as a judgment *against* the Corporation does not *bind* the trustee, so *a judgment in*

favor of the Corporation does not protect him—since, as the Courts say in Meltzer *vs.* Doll, 91 N. Y., at p. 373, "It is of the essence of an "estoppel by adjudication, that it should be *mutual.*"

See also, as following Miller *vs.* White:—

Bruce *vs.* Plate, 80 N. Y., 379.

Whitney *vs.* Cammann, 137 N. Y., 342.

But, here, there is no judgment in favor of the Warehouse Company, but a simple *discontinuance* by the plaintiff after the decision of the Court of Appeals of New York, that the plaintiff had notice from the form of the transaction that the notes were endorsed by the Warehouse Company for the accommodation of Squires, Taylor & Co.

If there were a judgment, it was for the defendant to plead and prove it.

The decision in Miller against White, is *conclusive* upon this Court—since it is the construction put by the highest Court of the State of New York, upon a Statute of that State, that is a decision as to the relations of a Corporation of that State with its Trustees.

Second.

There being no question of *res judicata*, this Court is not bound to follow the decision of the Court of Appeals in the Warehouse case—but, on the contrary, it is bound to follow its own decisions and its own ideas as to what the law should be on the question as to whether the plaintiff had notice, from the form of the transaction that the endorsements were for accommodation; or as to whether the endorsements were, *in fact*, made for accommodation.

Section 34 of the Judiciary Act of 1789 (now Section 721 of the United States Revised Statutes), provides that "the laws of the several States" shall govern in the trial of common law actions, in each State.

But it is settled that *laws* mean "*statutes,*" and not the decisions of Courts.

And the rule is that as to general questions of law, the Federal Courts will adopt their own rules.

Otherwise, as is said in the cases cited below, the Federal jurisprudence would be a mere hotch-potch, and the whole function of the Federal Courts would be surrendered.

A striking instance of this, is found in the distinction between the rulings of the Court of Appeals of this State, and those of the Supreme Court of the United States, as to what constitutes a holder for value of commercial paper. In this State, no one is a holder for value, unless he took the paper for a present consideration—while the Federal Courts hold that taking paper as security for *a precedent debt*, makes the taker a holder for value.

See Swift *vs.* Tyson, 16 Peters, 1—which has always been followed by the Supreme Court.

In that case, the Supreme Court of the U. S. thus state the rule:

"In all the various cases which have hitherto come
"before us for decision, this Court has uniformly sup-
"posed that the true interpretation of the thirty-fourth
"section limited its application to *state laws strictly local*,
"that is to say, to *the positive statutes of the state*, and
"the construction thereof adopted by the local tribunals,
"and to rights and titles to things having a permanent
"locality, such as the rights and titles to real estate, and
"other matters immovable and interterritorial in their
"nature and character. It never has been supposed by
"us, that the section did apply, or was designed to apply,
"to questions of a more general nature, not at all depend-
"ent upon local statutes or local usages of a fixed and
"permanent operation, as, for example, to the construc-
"tion of ordinary contracts or other written instruments,
"and especially *to questions of general commercial law*,
"where the state tribunals are called upon to perform the
"like functions as ourselves, that is, to ascertain, upon
"general reasoning and legal analogies, what is the true

" exposition of the contract or instrument, or what is the " just rule furnished by the princples of commercial law " to govern the case. And we have not now the " slightest difficulty in holding, that this section, upon its " true intendment and construction, is strictly limited to " local statutes and local usages of the character before " stated, *and does not extend to contracts and other in-* " *struments of a commercial nuture*, the true interpreta- " tion and effect whereof are to be sought, not in the de- " cisions of the local tribunals, but in the general princi- " ciples and doctrines of commercial jurisprudence."

And, to the same effect, see Carpenter *vs.* Insurance Co., 16 Peters, 495, and at foot of p. 511.

And the rule is again stated in Oates *vs.* Bank, 100 U. S., at p. 246, as follows:

" While the Federal Courts must regard the laws of " the several States, and their construction by the " State courts (except when the Constitution, treaties " or statutes of the United States otherwise provide) as " rules of decision in trials at common law in the courts of " the United States, in cases where applicable, *they are* " *not bound by the decisions of those courts upon ques-* " *tions of general commercial law.* Such is the estab- " lished doctrine of this court, so frequently announced " that we need only refer to a few of the leading cases " bearing upon the subject.

" Swift, *v.* Tyson, 16 Pet. 1;
" Carpenter *v.* Prov. Ins. Co., *id.* 495;
" Watson *vs.* Tarpley, 18 How. 517."

But this Court cannot need any information upon this subject.

The rule on this subject is well settled, and may be stated thus:

The Federal Courts will follow the decisions of the highest Courts of the State, in respect to the con-

struction of the Constitution or Statutes of the State, and as to the law of real estate situated within a State, and where rights of property have become vested under the decisions of State Courts before the Federal Courts have laid down any rule upon this subject, and as to local customs and usages. These rules *help* us, as to the question decided in Miller against White, *supra*, and as to some questions hereafter mentioned.

But the question involved in the decision of the Court of Appeals, in the Warehouse case, (that is, whether the fact that the endorsed notes were offered for discount by the makers was "notice to the plaintiffs"), is a general question of commercial law—as to which this Court is not bound by the decision of the Court of Appeals.

The learned Judge who tried this case below admits in his opinion that the decision of the Court of Appeals of New York in the suit against the Warehouse Company on the question as to whether the plaintiff had notice of the character of the endorsements, and also as to whether the endorsements were for accommodation, was not binding upon him, nor upon this Court.

(Transcript, p. 22).

B.

THE WAREHOUSE COMPANY IS LIABLE UPON THE ENDORSEMENTS ON THE NOTES IN SUIT.

This Court not being bound by the decision of the Court of Appeals of New York in the suit against the Warehouse Company, we now proceed to a discussion of the main points of this case.

a. Robert Squires, President, had authority to bind the Warehouse Company by making and endorsing commercial paper in its name.

Third.

"Robert Squires, President," had authority to endorse these notes in the name of, the Warehouse Company.

At the outset, it is important to call the attention of the Court to a distinction in regard to which there is often much confusion—that is, the distinction between acts which are *beyond the power of a Corporation*, and acts which a Corporation *has done*, through an officer or agent empowered by it.

These questions are entirely distinct.

All corporate powers, are vested in the directors, and in such officers or agents as they may appoint in any way known to the law.

A Corporation may not have power to do an act, that is the act may be *ultra vires of the Corporation*), and yet the officer or agent of the Corporation, may be empowered to bind the Corporation by the contract, or act, so far as the Corporation can be legally bound.

Thus a Corporation has no power to make *accommodation endorsements*—but if its President has power to endorse generally, his accommodation endorsement may be enforced by an innocent holder, though it is *ultra vires* of the Corporation.

For, as the Court say, in Booth *v.* Bank, 50 N. Y., 396, at foot of page 400 on top of page 401, "A Corporation "*may do wrong*, through its agents, as well as a private "individual"—and this "is not affected by the fact that "the act which the officer assumed to do, is one which "*the corporation itself*, could not rightfully do."

Many cases are there cited for this proposition.

So, in answering the objection that a Corporation *has not done an act*, because it *had no power to do it*, the Court say, in Parish *vs.* Wheeler, 22 N. Y., at page 504, (in answering the objection that a Corporation *had not bought a steamboat*, because *it had no power to buy it*):

"Much has been loosely and inconsiderately said about "the incapacity of corporations to acquire property out- "side of the precise purposes specified in their charters. "To all propositions of this nature the short answer is, "that *corporations sometimes do actually purchase and "hold property under that condition.* If a railroad com- "pany buys and pays for a horse or a boat, and the ven- "dor delivers the chattel, the corporation will own it and "can sell or mortgage it, although its charter cannot be "pleaded in strict justification of the purchase. This is a "conclusion of common sense and common honesty, "which no legal subtlety or refinement can refute."

So, in the Case of Bissell *vs.* R. R. Co., 22 N. Y., 258, it was held that, although a corporation *had no power* to do an act, *it had done it*, and was liable for the consequences.

There two railroad companies had unlawfully consolidated, and in answer to an action brought by a passenger who had been injured, it was said that the Company which had made the contract, (sold the ticket), had no power to sell a ticket over the whole route.

The answer was that the defendant *had done the act*, and must pay the damages.

This makes plain the distinction between the question whether the agent of a Corporation has power to do an act for it (so that it becomes *the act* of the Corporation), and the question whether the Corporation *has power* to do the act.

So the directors of a Corporation have no power to make, or authorize, accommodation endorsements.

But if, directly or indirectly, they authorize an officer to endorse notes generally, the Corporation is bound, if the notes are discounted by an innocent holder.

This is admirably stated in Credit Co. *vs.* Howe Co., 54 Conn., at pp. 387 and 388.

Fourth.

The findings of the Court below show beyond question that Robert Squires had authority to bind the Warehouse Company by signing or endorsing its name upon commercial paper.

The authority of a Corporate agent to do an act is proved in the same way in which the authority of any other agent is proved.

That is, the authority of an officer of a Corporation, (*the directors* being *the Corporation*, so far as the power of conferring authority upon an agent is concerned) may be conferred either by the charter, or by the By-Laws, or by an express resolution of the directors, or by a course of business known to the directors, or by the negligence of the directors.

The findings disclose the following facts:—

That Robert Squires was a trustee and president of the Company.

(Transcript. First Finding, p. 14.)

That he actually endorsed the notes in suit in the name of the Company.

(Transcript. Second Finding, p. 15.)

That prior to the endorsement and discount of the notes in suit he had endorsed twenty-one notes of Squires, Taylor & Co., "in exactly the same form *in all respects*," and that the plaintiffs had discounted them; and that while the directors of the Warehouse Company did not know of the making and endorsing of said notes or of the notes in suit, they were all entered upon the books of the Warehouse Company as its obligations.

(Transcript. Fourth Finding, p. 15.)

That prior to the discount of the notes in suit by the plaintiff it had discounted thirty-five notes, aggregating in amount the sum of $192,643.75. All of these notes were

endorsed by Squires as President of the Warehouse Company with the knowledge and approval of its directors.

(Transcript. Sixth Finding, p. 16.)

That Squires "arranged" and "prepared" for the discount of the line of notes, of which the notes in suit formed part.

(Transcript. Fifth Finding, p. 16.)

That the commissions received for endorsing the notes in suit appear upon the books of the Warehouse Company.

(Transcript. Ninth Finding, p. 17.)

That after the leasing of its warehouses, in November, 1876, the Warehouse Company and its directors "turned "over the whole conduct of their business to said Robert "Squires, president, and the directors held no meetings "unless summoned by said Squires, president, and said "Squires, president, alone had charge of the safe and "office of said Warehouse Company, and he alone had "the conduct of its business, and after such leasing, said "Robert Squires, president, with the knowledge and "approval of, and by the authority of the directors of the "Warehouse Company, endorsed, as such president, and "procured the discount thereof by the plaintiff, of the "notes mentioned in the preceding sixth finding, and "attended generally to the financial business of said "Warehouse Company, including the discounts by the "plaintiffs of the Berry & Bryan and Hoodless & Com-"pany notes, and various notes given to raise money to "pay the taxes and assessments of the Warehouse Com-"pany, and paid the rent of the offices occupied by said "Company, and generally attended to the financial and "other affairs of said Warehouse Company."

(Transcript. Eleventh Finding, p. 18.)

It is to be noted that nowhere does it appear from the findings that Robert Squires, president, did *not* have power to make or endorse paper for the company.

All of the references in the findings are statements of specific occasions when he *did* exercise that power, and statements to the effect that the *entire control and management* of the corporation had been turned over to him.

The fact that he did endorse the paper raises a presumption, in the absence of evidence to the contrary, (and the findings are the only evidence before this Court), that he had the power to make and endorse paper.

National Bank *vs.* Phœnix Company, 6 Hun, at p. 72.

Lovett *vs.* Steam Mill Co., 6 Paige, foot of p. 60.

Plum *vs.* Milk, 19 Barbour, 74.

This is, of course, based upon the presumption that a man is honest, and only does that which he has a right to do.

We might, therefore, safely rest on this presumption, but it is not necessary to do this.

The authorities are abundant to the effect that an officer of a corporation who is in the habit of exercising certain powers, and to whom the control and management of its affairs have been turned over, is presumed to have authority to transact the business and to perform the acts with respect to the corporation which he assumes to transact and perform.

In Phillips *vs.* Campbell, 43d N. Y., at page 272, the Court say: "It was abundantly proved that he," (that is the treasurer of the Corporation), "had been in the habit "of doing such business, with the knowledge and sanc- "tion of the Company; that he was, in fact, the sole "managing agent of the Company, and his authority, by "its uniform course of business, was ample. This was "sufficient. Parties are not confined to any peculiar "mode or kind of proof to establish the authority of an

"agent of a Corporation to do an act of this character."
To the same effect, see

Munn *vs.* Commission Co., 15 J. R., near top of page 55.

Olcott *vs.* R. R. Co., 27 N. Y., at foot of page 558.

Hoyt *vs.* Thompson, 5 N. Y., at foot of page 333.

Lester *vs.* Webb, 1 Allen, 34, and at middle of page 36.

Bank of Lyons *vs.* Demmon, Hill & Denio, at foot of page 405, and top of page 406.

In Goodwin *vs.* Screw Company, 34 N. H., at p. 380, it is said: "Where one has the actual charge and manage-
"ment of the general business of a Corporation, with the
"knowledge of the board of directors, this is evidence of
"his authority, without any vote, or other corporate act,
"constituting him the agent of the corporation."

The sources of Squires' authority are therefore twofold:

1st. The course of business.

2d. The turning over to him by the directors of the entire control and management of the Warehouse Company.

Fifth.

As to the course of business, and the fact that Squires was in the habit of endorsing commercial paper in the Company's name, with the knowledge of the directors, the citations from the findings in the foregoing point (Fourth), abundantly show.

That this was known to the plaintiff and relied upon by it is shown by the fact that the paper so endorsed by him was discounted by it. (Transcript, Findings Fourth and Sixth, pp. 15 and 16.)

Such a course of business is ample authority to an agent and the corporation is bound by his acts.

The answer which the defendant made below was that the notes upon which "the course of business" was sought to be predicated were notes made payable to the order of the Warehouse Company or of Squires, President, while the notes in suit were payable to the order of Squires, Taylor & Co.

This seems simply frivolous.

The variation in the form did not alter the nature of the obligation or the transaction, or *give notice of anything* to the plaintiffs.

When an authority is sought to be proved by a previous course of business, it is not necessary that the prior acts relied on *should have been precisely the same as those in suit.*

Two business transactions are rarely in exactly the same form. It is enough if the two acts *are of the same general character.*

The authorities are numerous and uniform.

In Commercial Bank *vs.* Norton, 1 Hill, 501, the authority to *accept* drafts, was conferred by a previous course of business, and the prior acts proved were the *drawing* and *making* and the *endorsing* of paper.

No instance of an *acceptance* was proved. But the Court say that the authority thus conferred extended to acts *of the same general character*, and that it covered *acceptances*, and even *accommodation acceptances.*

At page 504, Cowen, *J.*, says:

"I admit that the powers conferred on him by the de-
"fendants' articles of copartnership *did not reach accom-*
"*modation acceptances;* nor did it appear that he *had ever*
"*made such an acceptance before.* * * * *True, he*
"*did not mention the specific act of acceptance;* but his
"general powers in the business, and the usage of putting
"their name to commercial paper *in all other shapes,* was
"the same thing; and calculated to raise an inference in
"the public mind that he had such a power as to this."

" *It is not necessary , in order to constitute a general* " *agent, that he should have before done an act the same* " *in specie as that in question. If he has usually done* " *things of the same general character and effect, with the* " *assent of his principles, that is enough.*"

It is thus held that even a change *in the nature of the instrument* (from *a note* to *an acceptance*), does not amount to a departure from the authority, when the extent of the principal's obligation is not changed. But in the case at bar, there was not even a change in the nature of the contract (since in all cases the contract was an *endorsement*), but only in a trifling matter of *form.*

See, on the same point, Olcott *vs.* Tioga R. R. Co., 27 N. Y., near middle of page 560. " The recognition by a " corporation of acts on the part of an agent, *similar in* " *character* to these which may be in dispute, tends " strongly to establish the agent's authority."

In Merchant's Bank *vs.* State Bank, 10 Wall., 600, the law is thus stated in the head-note: " When the authority " of the agent is left to be inferred by the public from " powers usually exercised by the agent, *it is enough if* " *the transaction in question involves precisely the same* " *general powers, though applied to a new subject mat-* " *ter.*"

And it was held that a power to buy and sell *coin*, might be inferred from a custom to buy and sell *exchange.*

So an apparent authority to *accept bills*, is an apparent authority to make a *guaranty.*

Watkins *vs.* Vince, 2 Starkie, 368.

If any *authority* is needed for the proposition that paper drawn as this was does not indicate that the Warehouse Company was to become an accommodation endorser, see Lafayette Bank *vs.* Stoneware Co., 2 Missouri Appeals, 299, at p. 302, where the Court say: " The note sued on " was not, it is true, made *to the order of the defendant,* " *but that did not tend to show that it was not received by*

" it in payment, or as collateral, in the regular course of " its affairs."

Whether the fact that the Squires, Taylor & Co. notes *were discounted for the makers,* was notice to the bank that the endorsement of the defendants were accommodation, is an entirely different question, which is discussed below, beginning at Point Eleventh.

Sixth.

The general abandonment by its directors of the entire management and control of the Warehouse Company, both financial and otherwise, to Robert Squires, in itself conferred authority upon him to make and endorse paper for it.

The details of this abandonment appear in the Eleventh Finding of the Court (Transcript, p. 18), which is quoted at length in Point Fourth, *supra.*

The Schuyler Fraud Case, (34 N. Y., 30), went partly on this point.

There Schuyler had issued a large amount of fraudulent stock, which the railroad company sought to repudiate on the ground that he had no authority to issue stock unless upon the surrender of a certificate which had previously been issued—but the Company was held liable.

The decision was put upon two grounds.

One was the doctrine of "*extrinsic facts,*" hereinafter referred to, and it was held that the issuing of a new share of stock was a representation that an old share had been surrendered.

The discussion of that branch of the case begins at the 7th line of p. 61 of 34 N. Y.

But the Court had previously held the Company liable upon the ground that the directors had for years aban-

doned the whole conduct of the Corporation to Schuyler, and hence the public had a right to suppose that he *possessed* all the powers which the directors could confer, and the Corporation " were estopped by the facts and circum- " stances of this case, to deny the authority of Schuyler."

34 N. Y., at top of p. 61.

At p. 54 the Court say: "The board handed over to " Schuyler all the power the directors themselves pos- " sessed in respect to the transfer of stock at the New " York Agency. * * * *They gave into his absolute* " *control the keeping and management of such books, and* " *the employment and control of the clerical force neces-* " *sary to that purpose. For more than seven years they* " *left to him the unchecked and unquestioned management* " *of the enormous business of this transfer office.* * * * " *It is apparent that the use of ordinary care and a* " *diligence at any time after March, 1848, would have dis-* " *disclosed that Schuyler's management was fraudulent,* " *both as to the company and the public, and likely to lead* " *to the disasters that have followed upon it.* * * * "The arrangement by virtue of which the transfers " made on false certificates before the increase of the " capital, became genuine stock, *may have been made in* " *ignorance; but it was an ignorance based on a negligence* " *so gross that the fact becomes as potent as though the* " *truth had been known.* It may have been in ignorance " that the company received the benefit of large sums " raised by Schuyler indiscriminately on genuine and " spurious certificates. Charity may grant that, *but* " *equity cannot disregard the fact, for it was a duty to be* " *wise. It is transparent, throughout the case, that the* " *board of directors, by passive submission or active sur-* " *render, handed over to Schuyler the substance of all their* " *authority relative to their business in New York, and* " *then, for nearly seven years, laid down to sleep in supine* " *indifference at his feet.*"

And at pp. 58 and 59:

* * "The company placed in Schuyler's hands the " very instrumentalities by which the injury was wrought.

"*They imposed restrictions upon their use, but they* "*omitted the safeguards that ordinary prudence would* "*dictate to discover or prevent their abuse. A wrong* "*which ordinary care will prevent, is in a legal sense,* "*caused by the omission of that care, where it is a duty* "*to use it.* At any stage, a discovery of Schuyler's past "frauds would have arrested his career of crime. *A dis-* "*covery would have followed the examination of the books* "*of the office, which were the only records of the vast* "*stock transactions of the company at New York. An* "*examination was a duty, because it was the obvious* "*dictate of good sense, as the easiest and safest check* "*upon the agent's conduct. The long-continued and reck-* "*less omission was therefore a culpable negligence* * * * "*and therefore it may be said to have led directly to the* "*injurious acts.*"

No better description of the absolute surrender of the Warehouse Company's affairs to Squires than this foregoing quotation from the Schuyler case could be written.

The books of the company showed that the endorsements had been made, (Fourth Finding, p. 15) and the books also showed that the Commissions had been deceived (Ninth Finding, p. 17).

By their carelessness the directors must be taken to have known and to have acquiesced in the act of Squires in endorsing the paper.

The Fishkill Savings Institution *vs.* National Bank, 80 N. Y., 162, is a strong case.

There Bartow, the defendants' cashier, was the plaintiffs' treasurer, and he fraudulently took bonds belonging to the plaintiffs, and pledged them for a debt of the defendants.

The defendant denied that its cashier had any authority to do this act, and insisted that *its directors were ignorant of it.*

But the Court say, at page 168: "I do not think the "case for the plaintiff would be any stronger *if the* "*actual concurrence of the directors in the cashier's* "*fraud was established.* If they were ignorant of it, *it* "*is because they omitted the performance of official*

"*duty*, and so were not less bound than if the ignorance "was intentional, that they, or the bank they represent, "might profit by it. *This the law will not tolerate.* (*Ken-*"*nedy* vs. *Greene*, 3 M. & K., 699.)"

Then, after speaking of some evidence which tended to show *actual* knowledge and approval by the directors, the Court proceeds at page 169:

"This, however, need not be relied upon, for it is ap-"parent *that the least degree of that diligence and care* "*to the exercise of which the directors of the bank were* "*bound by the simplest obligation of duty*, would have "disclosed to them the large outstanding indebtedness "of the bank, and the means adopted by Bartow to carry "it along. *The defendants should be treated as if they* "*had made the inquiry and ascertained the fact* (New "Hope & Delaware Bridge Co. *vs.* Phœnix Bank, 3 "COMST., 156). Indeed, a direct resolution of the board "of directors, leading their cashier's steps in the "direction which they took, would be no more con-"vincing of their moral participation in the wrong done, "than is the *indifference and heedlessness to their own* "*duties, through which alone he was able to perpetrate* "*the fraud.*"

City Bank *vs.* Perkins, 4 Bosworth, 420, at 441 and 444.

Beers *vs.* Phœnix Glass Co., 14 Barbour, 358, at pp. 360 and 361.

Conover *vs.* Insurance Company, 1 New York, 290, at p. 293.

It is no answer for the directors to say, as they do, that they *did not know* what Squires was doing.

The very point of the cases cited, is that *ignorance which results from negligence in enquiring* IS KNOWLEDGE.

In none of these cases did the directors *know what was going on.*

In the Schuyler case the Court say:

"*The Court has found that it does not appear that any* "*other director than Schuyler had personal knowledge of*

"*his fraudulent acts; but it has also found that the direc-*
"*tors were guilty of negligence in not making any exam-*
"*ination of the books or the conduct of the transfer*
"*office.*"

34 N. Y., near foot of p. 57, and at foot of page 89.

See also Alexander *vs.* Cauldwell (83 N. Y., 480), at page 486), as to the effect, with respect to notice to the directors, of a corporation of business being carried on at its office and entered on its books.

Seventh.

In case it should be said that the fact that the Warehouse Company had leased its warehouses and gone out of business was notice that Squires had no authority to bind it by his acts, the answer is threefold.

First.—There is nothing in the findings to show that the plaintiff knew of such leasing; in fact it did not. Hence it cannot affect the plaintiff.

"In cases where the authority of an agent has been
"wholly withdrawn, the neglect of the duty to notify
"parties who have dealt with him, estops the principal
"from denying the continuance of the agency, although
"no power in fact exists."

Schuyler fraud case, 34 N. Y., at middle of page 59.

National Union Bk. *vs.* London, 66 Barbour, 189, at p. 194.

Marsh *vs.* Gilbert, 2 Hun, 58, pp. 59 and 63.

Second.—From the warehouse receipts, by means of which the collateral tobacco was pledged to secure the notes in suit, a copy of which appears at page 18 of the Transcript, it appears that the Warehouse Company was doing business; that its storehouses were open; that goods

were being received, and that it employed inspectors to examine them.

Third.—But it would be *immaterial*, even if the plaintiffs *had known* that the Warehouse Company had leased their warehouses.

This lease was made on November 1st, 1876.

After that, the Warehouse Company *did not cease to do business*—but, on the contrary, transacted, with the knowledge of, and by the authority of, its directors, business involving hundreds of thousands of dollars, which involved the endorsement by Squires, President, of notes endorsed in the same form in which the notes in suit are endorsed, and the discount of said notes by Squires, President, in the plaintiffs' Bank.

Transcript. Sixth Finding, p. 16; and Tenth Finding, p. 18.

Eighth.

It is immaterial that the charter of the Warehouse Company (p. 1668, Vol. 2, Laws of New York, 1872) contains the provision that the company may execute contracts, etc., "which said instruments, or any of them, "shall bear the impress of the common seal of the "company, and be signed by the president and be coun-"tersigned by the secretary or treasurer, or may be in "any other usual and proper manner executed, *as the* "*board of directors of said company may, by by-laws or* "*by resolution, prescribe.*"

First.—Even if the direction of the statute had been *peremptory*, that every contract should be signed by two officers (and the directors had had no express authority to vary this by resolution, as they had here), *a course of business* to have only one officer sign would bind the company.

See Barnes *vs.* Ontario Bank, 19 N. Y., 152, where it is held that *a statute* requiring the signature of two officers to contracts, may be varied *by a course of business.*

As this is a construction by the highest Court of the State of a State Statute, this Court will no doubt feel that it is bound by it.

That case is also very instructive upon the general question of "notice to the plaintiffs," in this action.

Ninth.

If it should be claimed that it does not appear that the plaintiffs relied upon the authority of Squires, the answer is that the presumption is that they did.

When facts calculated to produce an influence or an estoppel are shown, and a party appears to have acted as the influence or estoppel would naturally incline him to do, the jury may infer that the actions were caused by the influence. It need not be shown affirmatively.

The rule is stated in Weeks *vs.* Fox, 3 Thompson & Cook, at foot of p. 356.

b. The endorsements were not accommodation endorsements.

Tenth.

It cannot be said that the endorsements were for accommodation since the Warehouse Company received consideration for them.

Very strangely, although their decision *assumed* that the endorsements were for the accommodation of Squires, Taylor & Company, the Court of Appeals did not pass upon that question—which shows the hurried nature of

their decision. At the foot of page 292 of 116 N. Y., the Court simply *refer* to the fact that the Warehouse Company received a consideration for the endorsements, but they do not discuss the question whether this consideration received by the Warehouse Company, did not make the endorsements "*business* paper," and do not refer to any of the arguments presented by the plaintiffs upon that subject.

There would seem to be no doubt that the endorsements were made for a consideration.

There is no question as to what an accommodation party is. The authorities are uniform.

An accommodation party is "one who puts his name "to a note or bill *without any consideration*, with the in- "tention of lending his credit to the accommodated "party."

1 Parsons N. & B., 195.

An "accommodation" endorsement, is one in which the endorser "has no interest" or "where he has no in- "terest in the subject."

Patchen Bank Case 13, N. Y., at middle of p. 315.

The ignorance of the directors of the fact that an endorsement has been made does not make it accommodation.

The test is did the endorser receive a consideration for his endorsement?

If he did, it is *not* accommodation.

Here, however, there was a double consideration:

First.—The tobacco which was collateral to the notes of Squires, Taylor & Co. was stored in the company's warehouses (See Warehouse Receipt, p. 18, Transcript), and although the warehouses were leased still the Company received *all* the storage charges by way of rent (Transcript, p. 18) and hence were interested in attracting storage.

Hence anything which attracted storage, (as the loan of its credit on tobacco stored with it) would benefit the Company.

By its charter the Warehouse Company had a right to make advances on property stored with it.

(Laws of New York, 1872, Vol. 2, p. 1668).

Now suppose that Squires, President, instead of advancing *the credit* of the Company, upon the tobacco stored with the Company by Squires, Taylor & Company, had advanced its *money* on the tobacco.

Can any one pretend, that this money was advanced as *a gift* to Squires, Taylor & Company, that is for their *accommodation*, even though the Directors did not know of the advance, or even though Squires, President, had been expressly forbidden to make the advance.

It makes no difference, so far as the "*accommodation*" character of the act is concerned, whether the advances on the tobacco were made in *the cash* of the Warehouse Company, or of *its credit* (the endorsements).

And, as honesty and fair dealing are always *presumed*, it should be presumed that Robert Squires made the endorsements in the legitimate business of the Warehouse Company for the purpose of attracting storage, rather than as mere accommodation endorsements.

As the endorsements were given to attract storage, it was a good consideration, and they were *not accommodation* endorsements.

Thus, where a railroad company, for the purpose of making connections and attracting business, guarantees bonds of another road, the consideration is held to be sufficient.

Conn. Mutual Ins. Co. *vs.* R. R. Co., 41 Barb., 1, headnote at foot of p. 1, and at p. 25.

Arnott *vs.* R. R. Co., 5 Hun, 608, and at p. 610 and top of p. 611.

Zabriskie *vs.* R. R. Co., 23 How. (U. S.), 381, and near foot of p. 399.

In *re* West of England Bank, L. R., 14, Chan. Div., 317, it was held that a bank might guarantee the payment of interest on the bonds of a manufacturing company,

" when the formation of the *latter company is of import-*
" *ance to the bank.*"

And "exchange paper" is always held to be " business paper."

Second.—Squires, President, *received commissions* of one-fourth per cent. per month, for these endorsements; which commissions went into the treasury of the company *and have never been returned.*

These commissions, (aggregating $2,000), were *received* by the Warehouse Company as a consideration for these endorsements.

(Fourth Finding. Transcript, p. 17).

The fact that the Directors, through their negligence, did not know that these commissions were being received does not *alter* the fact that they *were received,* and does not *prevent* their constituting a *consideration* for the endorsements.

The directors *did* know of the receipt of these commissions by the bringing of this action, and yet the Company never has returned them.

(Ninth Finding. Transcript, p. 17).

And the principle that a corporation cannot accept the benefit of its own wrongful act, and then repudiate the consequences, is too well established to need the citation of authorities.

These commissions were a sufficient *consideration* for the endorsements, and prevented them from being " *accommodation.*"

Where one makes advances by *accepting* a bill (and *endorsing* is the same thing), he is in no sense *an accommodation acceptor.*

Mottram *vs.* Mills, 2 Sand., 189, and at foot of p. 192, which case is approved in Gihon *vs.* Stanton, 9 N. Y., at p. 483.

Moore *vs.* Ward, 1 Hilton, 337, and at p. 343.

Talman *vs.* Bank, 18 Barb., 123.

That the consideration was small in comparison with the liability incurred, is immaterial.

Hurd *vs.* Green, 17 Hun, at p. 334.
Earl *vs.* Peck, 64 N. Y., 596, and at p. 599.

"The slightest consideration is sufficient for the great-
"est undertaking." Per Cowen, *J.*, in Oakley *vs.* Boorman, 21 Wend , near top of p. 594.

(*C.*) *The plaintiff is a bona fide holder, without notice, of the notes in suit, and as such is entitled to enforce them against the Warehouse Company and the defendant.*

Eleventh.

There is no question raised that the plaintiff did not pay value for the notes in suit before maturity, and the Findings so state it.

Assuming therefore that the notes were accommodation notes, the question still remains whether the fact that they were presented for discount by Squires, Taylor & Company, the makers, bearing the endorsement of the Warehouse Company, is such notice to the plaintiff of the character of the endorsements to prevent its enforcing the endorsements against the Company.

As the case in the New York Court of Appeals is the latest exposition of the doctrine, which we contend is wrong, we refer to that case at some length.

The case is reported in 116 New York Reports, 281.

It was decided by what was known as the Second Division of the Court of Appeals, a Court made up of Justices of the Supreme Court of the State, constituted for the purpose of clearing the then congested calendar of the Court of Appeals, and was decided shortly after its organization.

The decision reversed the decision of all the Courts below, and on the point under consideration was as follows:

"The fact that the notes were discounted by the makers, " was, *if unexplained*, notice to the discounter that the " endorsements were not made in the usual course of the " business of the endorsers, but for the accommodation " of the makers."

116 N. Y., at p. 293.

There are several answers to this contention, under decisions of the Supreme Court of the United States, (which has always been very solicitous to protect the sanctity of commercial paper), and, in that case, the Referee and the General Term of the Superior Court (53 Superior Court Reports, 367) followed the principles of the Federal decisions.

The first answer to the contention of the Court of Appeals, is this:

That endorsed notes are offered for discount by *the makers*, no doubt *suggests* that the endorsements were made for the accommodation of the makers—and, therefore, puts " the discounter," (to use the expression of the Court of Appeals), " upon inquiry " as to that fact.

The reason of this, of course, is that if A. gives a note to B., for a valuable consideration, or in payment of a debt (that is as " business paper "), *B.* is the person who, *usually* gets it discounted.

As it pays a debt to B., and thus is B.'s property, B. *keeps it*, or transfers it to third persons, and does not endorse it and hand it back to A, the maker. When, therefore, A. presents it for discount, endorsed by B., the transaction *suggests* that B.'s endorsement is for the accommodation of A.

But it has never been held, or pretended, that the fact that the maker of an endorsed note procures it to be discounted, is *conclusive evidence* that the endorsements were made for the accommodation of the maker, or *proves* that fact.

If a Bank should issue an insurance policy, it *would be* "*conclusive evidence*" to the taker of the policy, that the transaction was beyond the power of the Bank.

Everybody is presumed to know the law, and to know that a Bank has no power to issue an insurance policy.

But the possession of endorsed paper by the maker, by no means *conclusively* shows that the endorsement is made for the accommodation of the maker of the paper – since there are various ways in which paper endorsed by a corporation in its *own business* may be found in the hands of the maker.

There is no *legal impossibility*, or even any *improbability*, that the Warehouse Company, having received these notes in payment of a debt, (that is, as "business paper"), should endorse it and hand it back to the makers to be discounted by them.

This may be illustrated as follows:

If I am in Chicago, and there receive a note from a debtor in payment of a debt, I might naturally say to him, "I wish to get the note discounted, and as I have "no Bank account here, I wish you would get it dis-"counted for me, and give me the money."

And if he should say, (in case he had drawn the note to his own order, and had endorsed it in blank), "two names are required by my Bank on discounting paper," (which is the general rule among Banks), I might naturally endorse the note to him, and let *him* get the discount.

In that case, my endorsement would not be for the accommodation of the maker of the note, although the transaction would so import to the Bank which discounted the note.

So, by way of further illustration, if a Corporation were created expressly for the purpose of becoming sureties for other persons, or guaranteeing their debts by endorsement or otherwise, (and there are many such Corporations), such an endorsement would not be "accommodation," whatever the *appearance* might be—since, in the case supposed, the endorsement would be an act in the very business which the Corporation was created to transact.

That is, in that case, the *apparently* "*accommodation* endorsement," would be "*a business endorsement*," and in the case at bar, as has been shown in Point Tenth, *supra*, the Warehouse Co. was expressly authorized to advance money on goods stored, and consequently was authorized to advance its credit.

The Court of Appeals, in the Warehouse case, expressly admits that the discounting of endorsed paper for the makers, is not *conclusive notice* to the "discounter," that the endorsements are accommodation, when they say that those facts are such notice to the "discounter, unless explained."

116 N. Y., at p. 293.

And such is the language of all the cases on this subject.

If the fact there mentioned, were *conclusive evidence*, that the endorsements were *accommodation* "*no explanation*" would be possible; which shows that the Courts only treat this fact as one which ought to excite *suspicion*.

Twelfth.

All that can be said, therefore, is that the plaintiffs *suspicions* that the endorsements were accommodation, ought to have been aroused by the presentment of the notes for discount *by the makers*, and that the plaintiffs were bound to enquire into that matter.

But what was the result?

It is simply that the plaintiffs, *if they did not enquire*, were "*negligent*."

That is the utmost that can be charged against them.

But a conclusive answer to this charge, and to the decision of the New York Court of Appeals, is that "*negligence*," however gross on the part of the holder of commercial paper, is no defence.

In every other transaction except the title to commercial paper, a neglect to enquire into circumstances which suggest the existence of impeaching facts, constitutes notice of facts which could have been learned by such enquiry; but commercial paper rests upon an entirely different rule in that respect.

It "must ever be regarded as favored instruments," and especial rules exist to protect the holder.

Collins *vs.* Gilbert, 94 U. S., at p. 754.
Credit Co. *vs.* Howe Co., 54 Conn., at top of p. 387.

The rule that "*negligence*," even of the grossest kind, does not prevent a recovery by a person who has taken paper for value and before maturity, is settled by the Supreme Court of the United States, as well by the Court of Appeals in this State, and by the Courts everywhere else.

> In Hotchkiss *vs.* National Bank, 21 Wallace, at page 359, the Court say: "The law is well settled, "that a party who takes negotiable paper before due, "for a valuable consideration, without knowledge of "any defect in title, in good faith, can hold it against "all the world. A *suspicion* that there is a defect in "the holder, *or a knowledge of circumstances that "might excite such suspicion in the mind of a "cautious person, or even gross negligence at "the time*, will not defeat the title of the "purchaser. *That result can be produced only by "bad faith, which implies guilty knowledge or willful "ignorance*, and the burden of proof lies on the assail-"ant of the title."
>
> And see
>
> Collins *vs.* Gilbert, 94 U. S., at p. 754.
> Goodman *vs.* Simonds, 20 How. (U. S.), 343, and at p. 365.
> Goodman *vs.* Harvey, 4 Adol. & Ellis, Old Series, 870.
> Raphael *vs.* Bank of England, 17 Common Bench, 161.

In Magee *vs.* Badger, 34 N. Y., at page 249, it is said: "One who purchases commercial paper for full "value before maturity * * * is not bound, at "his peril, *to be on the alert for circumstances which* "*might possibly excite the suspicions of wary vigil-* "*ance.* He does not owe to the party who puts ne- "gotiable paper afloat, *the duty of active inquiry,* "to avert the imputation of bad faith. The rights of "the holder are to be determined *by the simple test of* "*honesty and good faith, and not by a speculative* "*issue as to his diligence or negligence.*"

And see Murray *vs.* Gardner, 2 Wallace, 110, p. 121: "Suspicion of defect of title or the knowledge "of circumstances which would excite such suspicion "in the mind of a prudent man, or *gross negligence* "on the part of the taker at the time of the transfer, "will not defeat his title. That result can be pro- "duced only by bad faith on his part."

Bank *vs.* Eldred, 9 *id.*, 544.

Kelly *vs.* Solari, 9 M. & Welsby, 54.

Townsend *vs.* Crowdy, 8 Common Bench, N. S., 476.

There is no "fraud or bad faith" in the plaintiff's omitting to notice, or attend to, the fact that the notes were offered for discount by the makers; and, indeed, probably few banks know anything about the rule.

Certainly this Court will never find, as a fact, that the plaintiffs were guilty of "a fraud or bad faith" in the premises.

A great bank does not discount paper exceeding $300,000 in amount, when it suspects that it is indorsed fraudulently.

The source of the error of the Court of Appeals in the Warehouse case, and of the cases which hold that the fact that the possession of endorsed paper by the makers precludes a recovery, if it turns out that the endorsements *are* accommodation, is very apparent.

It is simply that the Courts so deciding have overlooked

the rule that *negligence* in the holder, does not prevent a recovery.

This is shown by Judge Lowell, in *ex parte* Estabrook (2 Lowell's Decisions, 547), which is referred to below.

Thus the leading authority, in this State, which holds that discounting endorsed paper by the maker, is "notice" that the endorsements are accommodation, is Stall *vs.* Catskill Bank, 18 Wend., 466, and at p. 478.

All the subsequent cases are based upon that.

But, as is above stated, what these cases call "notice," is simply "a putting upon enquiry," and the neglect of the taker of the paper to *pursue* that enquiry, is simply "*negligence*," and since the decision in the Stall case, the rule of law *as to the effect of such negligence*, has been entirely changed, as is shown above.

When Stall against the Catskill Bank was decided, the rule which prevailed was that laid down in Gill *vs.* Cubitt, 3 Barnwell and Creswell, 466, that "*negligence*" in the taker of paper, prevents a recovery.

But that doctrine has been entirely repudiated, in England, in Goodman *vs.* Harvey, 4 Adol. and Ellis, Old Series, 1870, and in the cases in this country, just cited—Goodman *vs.* Simonds, 20 Howard (U. S.), 343, and at p. 365, and the other cases cited.

But nevertheless, the cases in this State, cited by the Court of Appeals in the Warehouse Case, have gone on, carelessly, deciding that the mere fact that the taker of paper did not pursue the inquiries *suggested* by finding endorsed paper in the hands of the maker, precludes his recovery.

The Supreme Court of the United States will never sanction any such rule.

In accordance with the present rule as to the effect of "*negligence*," it was held in *ex parte* Estabrook, 2 Lowell's Decisions, 547, that the circumstance that an endorsed note was offered for discount *by the maker, is not enough to charge the holder with notice that the endorsement was for accommodation.*

See at page 549, where it is said:

"It is argued, that there is some evidence tending to "prove, that the fact that a note is offered for sale or dis- "count by the promissor (*i. e.*, the maker), *has a tendency* "*to excite the suspicion that it is endorsed for his accom-* "*modation, and to put the buyer on inquiry.* Granting "that this is true, and, for the purpose of this case, that "the conversations testified to do not prove a sufficient "inquiry to satisfy an inquisitive mind, yet here, again, "the decisions of the highest Court are, that a failure to "enquire, or negligence of any degree, will not invalidate "the title of the holder, unless they convict him of actual "knowledge, or of a willful negligence amounting to "fraud: *Goodman* v. *Simonds*, 20 How., 343; *Murray* v. "*Lardner*, 2 Wall., 110; *Michigan Bank* v. *Eldred*, 9 "Wall., 544; *Hotchkiss* v. *National Banks*, 21 Wall., "354.

"These authorities are decisive, unless I should be satis- "fied of *knowledge or fraud in fact*, which I am not, and "which was not seriously imputed to these creditors in "argument."

And Wait *vs.* Thayer, 118 Mass., 473, 478, is in accordance with Judge Lowell's decision, as is shown just below.

It is true that in Lemoine *vs.* Bank, 3 Dillon, 44 (cited by the Court of Appeals at p. 293 of 116 N. Y.), Judge Dillon held that the rule which holds that negligence in the taker of paper does not bar a recovery, does not protect the person who discounts endorsed paper for the maker.

This case is directly opposed to Judge Lowell's decision in *ex parte* Estabrook (2 Lowell's Decisions, 547), and this Court will have to decide between them, *so far as the question of authority* is concerned.

Judge Lowell's decision is *the later* one (having been decided in 1877, while Judge Dillon's decision was made in 1874), and the other case was not referred to.

Judge Dillon, however, says, in his opinion, that he was at first impressed with the argument that as *negli-*

gence in the taker of paper is no defense, (citing Goodman *vs.* Simmonds, *supra*), finding endorsed papers in the hands of the maker, did not preclude a recovery—but he says that he changed his mind on reflection.

3 Dillon, at p. 50.

But with all respect for the learned Judge, we submit that his error is very apparent, and it consists in not attending to the precise meaning of the word "notice" in the statement that "the fact that endorsed paper is pre-"sented for discount by the maker, is '*notice*' that the "endorsement is accommodation."

We have shown above that the fact in question does not show *conclusively*, or *prove*, that the endorsement is accommodation, but merely "excites a suspicion," or "puts the taker upon enquiry"—since there are many ways in which *business paper* may be legitimately presented for discount by the maker.

But Judge Dillon says that "when a bank has *knowl-"edge* that the endorsement is accommodation," it is not protected by the principle that *negligence* is not a bar.

3 Dillon, at p. 50.

He thus makes the mistake of supposing that the fact in question is *conclusive proof* that the endorsement is accommodation, and that the taker of the paper therefore "*knows*" it.

Of course, if the taker *knew* the fact, instead of merely neglecting to *pursue an inquiry into circumstances*, he could not recover; since he would then have the "*guilty knowledge*" spoken of in Hotchkiss *vs* National Bank, 21 Wall, at p. 359 (above quoted from), and would not come within the rule that *negligence* is no bar.

The distinction between "*knowledge*" and "*negligence*" is perfectly plain.

Judge Lowell states much more accurately and scientifically (in the extract above quoted) the effect of finding endorsed paper in the hands of the maker, when he says

that it "has *a tendency to excite a suspicion* that it is en-
" dorsed for the accommodation of the makers."

And the Supreme Court of Massachusetts has held the same thing—thereby agreeing with Judge Lowell.

Thus the question whether the officer of a Corporation has power to make or endorse paper of the Corporation *for accommodation*, is exactly the same question which arises when *one partner* attempts to use the paper or the credit of his firm for his own individual benefit, or for the accommodation of third persons.

In Bank of Genesee *vs.* Patchen Bank, 13 N. Y., at p. 314, near the foot, Judge Denio says :

"The authority of the governing officers of a Corpora-
"tion, to affect it by their contracts in its name, *is of the*
"*same general character* as that which a partner has to
"bind the firm."

Neither an officer of a Corporation, or a partner in a firm, or any other *agent*, has power, unless authorized, to use the paper or the credit of his principal, except in the business of his principal.

But in Wait *vs.* Thayer, 18 Mass., 483, where one partner had made a note, and endorsed it in the name of the firm, and procured it to be discounted by the plaintiff, the Court held, agreeing with our reasoning, that this fact was not *conclusive evidence*, and did not *prove*, that the endorsement was made in the business of the individual partner—that is, that the endorsement was "*accommodation*"—but the question whether the plaintiff, in discounting the note, had *actual knowledge*, was *a question of fact* for the jury.

At page 478 of 118 Mass., the Court say:

"Warner being a member of the firm whose *indorse-*
"*ment* appeared upon the note, the fact that he was also
"*the maker* of the note in his individual capacity, *did not*
"*give rise to any conclusive presumption* that it was an
"*accommodation* indorsement, or that he negotiated the
"original loan and received the money, for his own pri-
"vate use, and not as a copartner."

This accords with the decision *in re* Esterbrook, 2 Lowell's Decisions, p. 547, and the argument which we have made.

Unless this Court is prepared to find as a fact that the plaintiffs *had actual knowledge* that "Squires, President," was defrauding the Warehouse Company by these endorsements—that is, that the plaintiffs were *knowingly and consciously participating in a fraud* in discounting these notes, the plaintiffs are not precluded from recovering under all these cases.

We cannot imagine that this Court will hold that the plaintiffs, a great Bank, were knowingly *participating in a fraud*, and discounting hundreds of thousands of paper which they "*knew*" to be endorsed *fraudulently*.

Thirteenth.

The only possible duty incumbent upon the defendant was that it should enquire of *some one competent to answer the question* whether the endorsements were for accommodation.

The question is, of whom should it have enquired, had it desired to use and had it used the *utmost possible diligence*.

The enquiry could not have been put to the corporation, an incorporeal entity.

It could not have been addressed to the directors, because they are merely casual officers, who meet only at stated times, and in this case are shown never to have met at all except when called together by Robert Squires.

Robert Squires was not only a *proper person* of whom to make the enquiry, but he was the only possible person from whom an inquiry could have been made, since the finding shows that the whole business of the Warehouse Company was turned over to him.

This brings the case squarely within the doctrine "of

extrinsic facts" laid down in North River Bank *vs.* Aymar (3 Hill, 162), and the Butchers and Drovers' Bank case (16 N. Y., 125).

The rule, in brief, is that when the power of an agent to do an act depends upon the existence of an extrinsic fact which is peculiarly within the knowledge of the agent, the person dealing with the agent may rely upon his representation that the fact exists; and *the doing of the act by the agent* is a representation that the extrinsic fact *does exist.*

The rule is the same in England.

Bank *vs.* Turguand, 5 Ellis and Blackburn, 248.

In this Court the same principle has been adopted in Town and County Bond cases.

Commissioners of Knox County *vs.* Aspinwall, 21 Howard (U. S.), 539, at p. 545.

In Credit Co. *vs.* Howe Co., 54 Conn., at top of p. 388, the Court puts the doctrine very clearly, as follows, speaking of the act of an officer of a Corporation who was authorized to accept drafts in the business of the Corporation, but *not for accommodation:*

"When he speaks the Corporation speaks. By accept-
"ing the draft he declares the drawer has funds, and that
"is the declaration of the Corporation. *Mercantile paper*
"*does not require those who would become its holders to*
"*go to the acceptor and insult him* by the question—did
"you tell the truth when you accepted that paper? They
"have a right *to assume that he tells the truth* and to act
"accordingly. If the treasurer in fact misrepresents the
"Corporation, *the Corporation, and not the person who*
"*trusts him, should bear the loss.*"

Unless all these cases are to be disregarded, it must be conceded that the only person to whom the plaintiffs *could* have applied for "*an explanation*" of the fact that the endorsed notes were offered for discount by the makers—"Robert Squires, President"—had already re-

presented, by endorsing the notes, that the endorsements *were* made in the business of the Warehouse Company.

But not only had "Squires, President," represented and "*explained*," by endorsing the notes, that the endorsements were made in the business of the Warehouse Company, but he had done more.

He "prepared for," and "arranged for," these discounts. That is, at the beginning of this line of discounts, he went to the plaintiff's Bank, and asked the plaintiffs to discount this class of paper.

(Fifth Finding. Transcript, p. 16).

The effect of this "arranging for" and "preparing for," these discounts, by "Squires, President," is strongly set forth in the Patchin Bank Case, 13 N. Y., at p. 317.

There the President of a Corporation had simply enclosed in a letter, a note for discount, and the Court of Appeals, in considering whether this did not amount to a representation by the President that the note was asked to be discounted "*in the* "*business of the Corporation*," say: "The note was trans-
" mitted to the plaintiff in an official letter written by
" that officer, with a request that the plaintiff would dis-
" count it. It is not said, in terms, in the letter, that the
" discount was applied for *for the benefit of the defendant*,
" but this is as strongly implied as though it had been
" stated."

So the "arranging," and "preparing for," the discount of these notes, by the President of the Warehouse Company, was still more a representation by him that the discounts were in the business of the Company.

Fourteenth.

The New York Court of Appeals admit that the circumstance of the presentation of the notes by the makers *might be* "*explained*."

116 N. Y., at page 293.

The circumstance was explained to the plaintiff in this transaction.

Where a given state of facts creates a presumption any one dealing with those facts has a right to rely upon the presumption until it is rebutted by evidence as much as he would be able to rely upon the facts if they were "proved," since an unrebutted presumption is conclusive.

1 Greenleaf on Evidence, Section 74; 1 Wharton on Evidence, Section 371; Elkin *vs.* Janson, 13 Meeson & Welsby, 667; 1 Taylor on Evidence, Sections 339 & 340.

The well-established rule, not only in this Court, but in the Courts of the State of New York, is that if an agent, corporate or otherwise, has a right to make or endorse a note, or to do an act, "*under any circumstances*," the taker of the note has a right to suppose that those circumstances exist.

So far from its being the duty of one taking negotiable paper, to make any inquiries about it, the rule is as follows—as stated by this Court, in the City of Lexington *vs.* Butler, 14 Wallace, at page 296—"When a corpora-
" tion has power, *under any circumstances*, to issue nego-
" tiable securities, the *bona fide* holder has a right to pre-
" sume that they were issued under the circumstances
" which give them the requisite authority."

And see a strong statement of the whole question, at the foot of p. 644 of 10 Wallace, and at top of p. 645.

And the same thing is said in Bissell *vs.* R. R. Co., 22 N. Y., at foot of p. 289, and at page 290; that the defense that paper is accommodation "is not available in a suit
" brought by a *bona fide* endorsee of a negotiable note,
"*provided the corporation was authorized to give notes*
"*for any purpose.*"

And, at top of p. 290, it is said that in giving a note (and the same rule applies to *endorsing*), the Corporation
" has virtually represented that it was given for some
" legitimate purpose, and the endorsee could not be pre-
" sumed to know the contrary."

And see the illustration of this principle given in 1 Parsons on Notes and Bills, at page 165 (2d Ed.).

And in Barnes against Ontario Bank, 19 N. Y., near foot of page 164, it is said: "If the Bank had a right to "draw a draft *for any purpose*, the abuse of the right "should not prejudice an innocent holder."

See further, upon this principle, the following cases:

Safford *vs.* Wyckoff, 4 Hill, at middle of page 445.

1 Daniel on Negotiable Instruments, Section 385, and cases there cited.

Therefore, when these notes were presented to the plaintiffs for discount, the plaintiffs had only to inquire whether the Warehouse Company could legitimately endorse notes *in their own business*—and, if so, the plaintiffs had a right to assume that the notes in question *were* so endorsed.

That the Warehouse Company had a right to make or endorse notes *for some purposes*, cannot be denied.

Corporations, unless especially restricted, have the power to make or endorse paper to the same extent that individuals have.

Angell & Ames on Corporations, section 257.

1 Parsons on Notes and Bills (2d Ed.), at page 164.

"A corporation, it is well settled, may, without special "authority, make a note or draft, or accept a draft for a "debt contracted in its legitimate business."

Partridge *vs.* Badger, 25 Barb., at page 170.

And see

Frye *vs.* Tucker, 24 Ill., at page 181.

Safford *vs.* Wyckoff, 4 Hill, at pages 445 and 446.

Barry *vs.* Merchants' Exchange Company, 1 Sand. Chan. R., at pages 289 and 290.

McMasters *vs.* Reed's Exrs., 1 Grant's Cases (Pa.), pages 47-49.

Rockwell *vs.* Elkhorn Bank, 13 Wis., at page 655; and cases cited in Abbott's Digest of Corporations, Vol. 1, at pages 116, 117 and 207-209.

It is impossible to conceive of a corporation whose powers are so limited that it cannot have debts due by it.

The Warehouse Company had power to sell, lease and mortgage all kinds of property, real and personal, and to make advances on property stored, and to receive storage fees and commissions, and, indeed, to do pretty much every kind of business.

See Section 3 of Charter, page 1668 of Volume II. of the Laws of 1872.

This necessitated the incurring of debts, and that implied the power to make notes to pay debts.

Therefore, when the notes in question were presented to the plaintiffs for discount, the plaintiffs were only bound to inquire whether these endorsements could, "*under any circumstances*" have been endorsed in the business of the Warehouse Company.

Our argument, which the Court of Appeals does not discuss at all, is that the plaintiffs were entitled to consider these endorsements as an exercise by the Warehouse Company of its power to "*make advances on merchandise.*"

If lending its *credit* is a legitimate way of making advances, as is shown to be the fact in this Point, then the plaintiffs had a right to suppose that the endorsements were made as a loan of credit.

The Warehouse Company *had the power*, in the exercise of their legitimate business, of "receiving upon consignment, storage or deposit * * * all kinds of property whatsoever * * * *and to make advances* upon all such property so received, stored and

"deposited with said Company, upon such terms as may "be established by the directors of said Company."

See Charter, Laws of 1872, Vol. 2, at p. 1668.

The notes themselves, and the warehouse receipts for tobacco "stored therein," which were deposited with the plaintiffs as collateral, and the acts of Squires, President, represented to the plaintiffs that the tobacco had been stored in the defendants' warehouse.

And it *was* so deposited.

(Tenth Finding. Transcript, p. 18.)

But it would be unimportant if the notes and the circumstances *had not made these representations*, because, so far as the plaintiff knew, the endorsements *might have been made as such advances.*

The plaintiffs, under the doctrine that if the Warehouse Company had power to endorse these notes "*under any circumstances*," *they*, the plaintiffs, were entitled to believe that those circumstances existed, were justified in believing that the endorsements were made as an advance, to Squires, Taylor & Company, on the tobacco which was represented to have been deposited in the warehouses, or *which might have been so deposited.*

The Warehouse Company might, legitimately, have made such advances by endorsing the notes of the persons who deposited the tobacco, as well as by advancing the money--that is, the Warehouse Company might have lent their *credit* to the depositors of the tobacco, instead of advancing *cash.*

If Squires, Taylor & Company deposited tobacco in the warehouses, and wished an advance upon it, the direct way of making such an advance, would have been for the Warehouse Company, upon the deposit of the tobocco, to give Squires, Taylor & Co. its (the Warehouse Company's) own cheque for the amount advanced; taking the note of the firm as an evidence of the indebtedness.

But instead of doing this, and then itself getting the note discounted to raise the money to make the advance, it would amount to the same thing for the Warehouse Company to *endorse* the note of Squires, Taylor & Co., *and let them procure its discount*—that is, to make an advance of the *credit* of the company, instead of its *cash*.

There is nothing illegal about advancing *credit* instead of *money*, and nothing unnatural.

In Munn *vs.* Commission Company, 15 J. R., 44, it was held that a corporation authorized to make advances might do it by accepting bills.

See head note and at pages 53 and 54.

Accepting bills and endorsing notes are mere *formal* differences between that method of "making advances" and the advance of *cash*.

To the same effect see Hascall *vs.* Ins. Co., 5 Hun, 151, and near foot of page 155, and at end of Points of Respondent in that case, at page 153

In Tripp *vs.* Swansey Mfg. Co., 13 Pick., 291, it was held that as the directors had power to pay wages to an agent they had the power to do it by the use of the company's *credit*.

At page 293 the Court says: "There can be no doubt, "therefore, that the directors had authority to make an "advance or payment of wages to the agent, and *that for* "*these purposes they might empower him to use the com-* "*pany's credit.*"

Under a power to *borrow money* a corporation may borrow *notes*, and procure them to be discounted.

Furniss *vs.* Gilchrist, 1 Sand., 53, and at page 57.

Holbrook *vs.* Basset, 5 Bos., 147 and subd. 6 of head-note, at page 148, and at middle of page 162.

Lucas *vs.* Pitney, 3 Dutcher (N. J.), 221, and at pages 228 and 229.

So, here, instead of issuing its own cheque, upon making an advance, the company might endorse the notes of the person wishing the advance, and let *him* get the note discounted.

So, under the power to lend money (make advances), notes *or endorsements* may be lent.

In Railroad Company *vs.* Howard, 7 Wallace, 392, it was held that a railroad could guarantee and transfer municipal bonds which had been issued to it, instead of issuing its own bonds. It is, in effect, the same thing.

At page 412 the Court say: "They may * * * guarantee their payment" (*i. e.*, of municipal bonds transferred to them), "as a means of augmenting their credit in the market, "*and saving the corporation from the necessity of* "*issuing their own bonds to accomplish the same purpose.*"

Talman *vs.* Rochester Bank, 18 Barb., 123, is exactly in point, and it shows that *the substance* and not *the form*, is to be looked at.

There M., being indebted to the bank, for the purpose of obtaining means to pay the latter, assigned a mortgage to a trust company, which mortgage the bank guaranteed. And the money obtained from the trust company was paid to the bank. The latter being sued on the guaranty, insisted that its obligation was without a consideration moving to itself, but was only *for the accommodation of M*

But the Court held that the transaction was the same in effect as if M. had assigned the mortgage to the bank, and the latter had transferred it with a guarantee.

See pages 135 and 136, and the remarks of the Court thereat.

And at pages 137 and 138:

"If Mumford had assigned the bond and mortgage to "the bank, and the bank had assigned them to the com- "pany, and guaranteed the payment as it did, it is con- "ceded that the bank would have been liable. The only "difference is, that the one transfer from Mumford to "the bank that would have been necessary in that case,

" was omitted, and Mumford, to simplify the transaction, " assigned directly to the company. This was a mere " matter of form in conveyancing, and neither one form " nor the other can be considered as in any degree an " attempt to enlarge the franchises of the bank. *The* " *measure of a franchise is never determined by im-* " *material forms. The question always is what power or* " *capacity has been given; not whether the power is exer-* " *cised in a particular form.* In substance the bank had " an interest in the bond and mortgage."

Within these principles, it made no difference whether the Warehouse Company gave its own check to Squires, Taylor & Co., as an advance, and took the notes from them, and afterwards got them discounted, as they might do—or whether they made one transaction of it, by endorsing the notes, and letting Squires, Taylor & Co., get the money on them. The legal liabilities of the parties would be precisely the same in both cases.

The General Term of the New York Superior Court took this view of the case.

53 New York Superior Court Reports, 367.

This Court has gone further than any other Court in protecting the holders of commercial paper, and the decision of the Court of Appeals in the Warehouse case is utterly opposed to all the rules laid down by it.

We are wholly unable to understand, it being indisputable that the fact that endorsed notes are procured to be discounted by the makers, does not *prove*, or *conclusively* show, that the endorsements were *accommodation*, and hence, that the fact in question merely puts the taker of the paper upon *inquiry*, the failure to pursue which inquiry, is merely *negligence*, how the decision in Stall against The Catskill Bank, can stand against the following well established principles.

FIRST.—That no amount of *negligence* bars a recovery, unless the Court is prepared to find that the plaintiff

actually knew that the endorsements were accommodation, and were *acting fraudulently*—which we cannot suppose that this Court will do in this case.

SECOND.—The well established rule that where paper can be legitimately made or endorsed *for any purpose*, the taker has a right to suppose that the requisite circumstances exist—it being shown, here, that the Warehouse Company might legitimately endorse as an advance of their *credit*, instead of advancing *cash* upon the tobacco stored with them.

We have in our favor, in addition to the foregoing *principles*, the two cases of Re Esterbook, 2 Lowell's Decisions, 547, and Wait against Thayer, 118 Mass., 473 and at p. 478, and also the decision of the General Term of the Superior Court in the Warehouse Company case (*supra*).

We submit that the weight of *authority* as well as of *argument* is with the plaintiff.

Fifteenth.

The knowledge which Robert Squires had about these notes did not become that of the plaintiff.

He did not *acquire* this knowledge *as a Director of the plaintiff*, but *as an officer of the warehouse company.*

There is a difference in this respect between an officer whose duties are permanent and continuous (as a president), and one who acts only *occasionally*, and at stated periods, like a director.

> Louisiana State Bank *vs.* Senecal, 13 Louis. R., 525-527 (Vol. 7 Condensed R., top paging 331 and 333).

In the latter case, two things are necessary to charge a corporation with a knowledge of a fact known to one of its directors:

First, he must have *acquired* his knowledge *when acting as a Director.*

Second, he must *act for his corporation* in some matter in which the knowledge becomes important to it.

Westfield Bank *vs.* Cornen, 37 N. Y., 320, at p. 323.

Bank *vs.* Savary, 82 N. Y., 29, at p. 307.

Squires never did act as an officer of the plaintiff in making these accounts.

They were all made by the regular officers of the plaintiff, as they had a right to do, "between boards."

U. S. R. S., Section 5136, Subd. 7; Seventh Finding Transcript, 16.

"Under direction of the Board" means only that the Board may give general directions on the subject or when discounts are reported to it, may give directions *as to the future* in regard to a particular line of paper.

Squires having nothing to do with the "discounting," his knowledge was not the knowledge of the plaintiff.

The fact that Squires "arranged" and "prepared" for the discounts has no effect, since he then acted as an *individual* and not as an *officer* of the plaintiff.

A single director has no power to make discounts.

Squires was present at the meeting of the Board of Directors of the plaintiff when the discount of the note of September 11th was reported, but his knowledge could not affect the plaintiff, since he must have acquired and used *that knowledge as a director;* and the knowledge which he acquired when he sat as such director could not affect the plaintiff as to a transaction which was then *completed.*

Squires was not present when the discount of the note of November 27th was reported.

Even though Squire's knowledge were such as would have bound the plaintiff under ordinary circumstances, it would not in the case at bar.

The rule is that where an agent acts on both sides of a

transaction with respect to his principal, and has a personal interest in addition to his interest as agent, he will be presumed not to have communicated any information to his principal which would defeat his personal ends.

Kenneday *vs.* Green, 3 Mylne & Keen, 699, at p. 720.

Re European Bank, L. R., 5 Chan. App., pp. 361 and 362.

Squires' personal motive here was to *help* his *son's* firm. For that purpose he arranged and prepared for the discounts. If they were unauthorized he was *ipso facto* perpetrating a fraud on the plaintiff.

Can anything be more absurd than to say that he would communicate this fraud to the plaintiff and thus prevent the very end he was seeking to attain?

The cases are very clear on this point. The self interest of the agent rebuts the presumption that he has communicated his knowledge."

Bank *vs.* Cunningham, 24 Pick., 270, at p. 274.

Lucas *vs.* Bank, 2 Stewart (Ala.), p. 321 (middle) and p. 296.

In Barnes against The Trenton Gas Light Co., 27 New Jersey *Equity*, the rule is well put when the Court say, at the foot of page 36 and at the top of page 37, after speaking of the general rule on the subject, as follows:

" But the rule does not apply to a transaction such as " that under consideration; for, in such a transaction, the " officer, in making the sale and conveyance, stands as a " stranger to the company. Stratton *v* Allen, 1 C. E. " Green, 229. *His interest is opposed to theirs*, and the " presumption is *not* that he will *communicate* his knowl- " edge of any secret infirmity of the title to the corpora- " tion, but that he will *conceal* it. Where an officer of a " corporation is thus dealing with them, *in his own in-* " *terest opposed to theirs*, he must be held not to repre- " sent them in the transaction, so as to charge them with " the knowledge he may possess, but which he has not " communicated to them, and which they do not other

" wise possess, of facts derogatory to the title he con-
" veys."

See also De Kay *vs.* Hackensack Water Co., 38 New Jersey Equity, at p. 161.

And, lastly, if *the bank* knew what Squires was doing, because he was its *director*, much more did the Warehouse Company know what he was doing, and that he was getting this money from the plaintiffs, because he was its *President*.

And it is idle to say that if the Warehouse Company knew that its President was endorsing as a means of making advances on merchandise, the plaintiff cannot recover.

C.

THE DEFENDANT IS LIABLE FOR THE DEBTS OF THE WAREHOUSE COMPANY BY REASON OF ITS FAILURE TO FILE THE REPORTS REQUIRED BY SECTION 12 OF THE MANUFACTURING ACT, AND IS, THEREFORE, LIABLE UPON THE NOTES IN SUIT.

Sixteenth.

It is assumed that if this Court disagrees with the decision of the Circuit Court, and holds that the Warehouse Company was liable upon its endorsements upon the notes in suit, that it will reverse the judgment and direct a new trial, without considering the question whether the defendant is liable as a trustee.

That question depending purely on the construction of the charter of the Warehouse Company and of the Manufacturing Act (Laws of New York, 1848, Chapter 40), both New York statutes, being more properly to be considered in the first instance by the Circuit Court.

The Court below expressly reserved its decision on that point.

Opinion of Judge Coxe, bottom of page 21 and top of page 22 of the Transcript.

In case, however, this Court considers that question, the following is submitted:

Whether the defendant is liable or not depends upon the question whether the Trustees of the Warehouse Company were bound by law to make, file and publish the reports required by Section 12 of the Manufacturing Act. That is, whether the trustees were subject to the provisions of that act.

Section 12 of the General Manufacturing Ac tof the State of New York, passed on February 17, 1848, being Chapter 40 of the Session Laws of that year, provides (Sec. 47 (Sec. 12) of 2 N. Y. Revised Statutes, 6th Ed., page 506) that if a manufacturing corporation does not, within twenty days from the 1st of January in each year, make, swear to, file and publish a report of the condition of the corporation, the trustees "shall be jointly and severally liable for all "the debts of the company then existing, and for all that "shall be contracted before such report shall be made."

It appears that William Remsen was a trustee of the Warehouse Company at all the times referred to in this action.

First Finding, Transcript, p. 14.

And it appears that the trustees of the Warehouse Company did not make, file, or publish, any reports.

First Finding, Transcript, p. 14.

As the two notes, the unpaid balances of which we are suing for in this action, were made, and discounted by the plaintiffs, on September 11th, 1878, and November 27th, 1878, respectively, and became due on January 14th, March 30th, 1879, respectively, the defendant, as the trustee of the Warehouse Company, became liable for

these notes (by the failure to file reports), if the provisions of the General Manufacturing Act applied to the trustees of the Warehouse Company.

Whether the debt of the Warehouse Company was "contracted" when the notes were discounted, or when the notes became due, is immaterial, as they became due in 1879, and no report was filed in that year, or at any time afterwards.

Whether this section 12 applies to the trustees (directors) of the Warehouse Company depends upon:

Section 9 of the Charter of the Warehouse Company—which appears at page 1673 of Volume 2 of the Laws of this State, of 1872.

For the convenience of this Court, we quote the Section here:

"The stockholders of said company, incorporated under "this act, shall be severally and individually liable to the "creditors of said company, to an amount equal to the "amount of stock held by them respectively, for all debts "and contracts made by such company, until the whole "amount of the capital stock fixed and limited by such "company shall have been paid in and become full stock, "and a certificate thereof shall have been made and re-"corded in the Clerk's office in the county where said "company have their principal financial place of busi-"ness; and when the stock held by such stockholder shall "be full paid stock, then to the extent of the amount of "said stock only, with costs against such stockholder. "*The corporation hereby created shall possess all the gen-"eral powers and privileges, and be subject to all the "liabilities*, conferred and imposed upon corporations "organized under and in pursuance of an act entitled 'An "'Act to authorize the formation of corporations for "'Manufacturing, Mining, Mechanical or Chemical "'purposes,' passed February seventeenth, eighteen "hundred and forty-eight, and the several acts extending "and amending the same, where the provisions thereof "are not inconsistent with the express provisions of this "act; and the said company, hereby incorporated, shall "be subject to the provisions of articles one, two and

" three, of title two, and to the provisions of titles three " and four, of chapter eighteen of part one of the Revised " Statutes, so far as said provisions are not inconsistent " with the provisions, or any of the provisions, of this " Act."

There is no decision, one way or the other, upon this Statute to embarrass this Court.

The decision of the General Term of the Superior Court of the City of New York, (55 Superior Court Reports, 144), to which the defendant's counsel may refer has no application whatever to this case.

FIRST.—That decision was rendered in an action against Remsen as *a stockholder*, (as to which the language of this Section 9 is entirely different from that which relates to the liabilities of *trustees*, as is shown below), and the decision went wholly upon *the Statute of Limitations*, which defense is neither pleaded or proved in this case.

The General Term held that the plaintiffs should have sued William Remsen *as a stockholder* of the Warehouse Company, within six years from the time that the notes became due, instead of within six years from the time when the plaintiffs exhausted their remedy by execution against the Warehouse Company.

No such question arises here.

The defense of the Statute of Limitations is not *pleaded* here, and this action was *begun* within *three years* from the time when the notes were *due*.

SECOND.—The decision of the General Term of the Superior Court went upon the language of the charter of the Warehouse Company, which applied only to the liability of *stockholders* of that company—and which did not touch the liability of the *trustees*.

The Opinion and reasoning of the General Term went entirely upon this distinction.

Section 9, of the Charter of the Warehouse Company, above referred to, says that "the Corporation * * *

" shall be subject to all the *liabilities* imposed upon the " Corporations incorporated under the General Manu- " facturing Act."

The first question is whether "*the Corporation*," means " *the trustees.*"

The Court of Appeals of the State of New York has determined that question, and that determination is binding upon this Court—since it is for the highest Court of any State, to decide to the meaning of a State Charter.

Swift *vs.* Tyson, (*supra*).

The Court of Appeals has decided that " *Corporation*," in such Statute, includes the *trustees*, and that the liabilities of the " *Corporation* " means the liabilities of "*the trustees.*"

It would be very strange if it were not so.

But the decision of the Court of Appeals covers the whole ground, and is conclusive.

The decision referred to is as follows:

By Act, Chapter 63, Laws of 1863, it was enacted that three or more persons might organize, in the manner specified in the General Manufacturing Act, a Corporation for the bottling of spring water.

And Section 2 of the Act then provided that "*the Cor-* " *poration* so formed, shall be subject to all the pro- " visions, *duties and obligations* contained in the above " mentioned act, (the Manufacturing Act), and shall be " entitled to all the benefits and privileges thereby con- " ferred."

A stockholder of one of these Mineral Spring Corporations, being sued by a laborer, for services performed for the Corporation, under Section 18 of the Manufacturing Act (2 R. S., 6th Ed., p. 507, section 53 [18]), which provides that stockholders shall be *liable* to laborers, &c., objected that the charter (Act, Chapter 63, Laws of 1863, Section 2), only made *the Corporation* subject to the obligations of the General Act, and that this did not mean *the stockholders.*

But it was held that "*the Corporation*" included *the stockholders*, and all the component parts of the Corporation, and that the language used, made *the stockholders* of the Mineral Water Company, subject to all the *liabilities* of stockholders of manufacturing companies.

Wakefield *vs.* Fargo, 90 N. Y., 213, and at foot of page 216.

And see Opinion of the General Term, on a former trial of the case, reported (*sub nomine* Wakefield *vs.* Davidson & al.) 5 New York Weekly Digest, 454.

And this construction was reiterated in Veeder *vs.* Mudgett, 95 N. Y., at foot of page 311, and at top of page 312.

The meaning of the word "Corporation" or "Company," in the Statute *imposing liabilities*, has therefore been determined, in a way which is conclusive upon this Court, to include *all the component parts of the corporation.*

And in Utley *vs.* Union Tool Co., 11 Gray, at page 141, it is said that "until the organization is completed, the "association does not become a corporation, and * * * "is not subject to the duties and liabilities of *a corpora-* "*tion, among which is the liability of the stockholders for* "*Corporate debts, if certain provisions are not complied* "*with.*"

That is, the liabilities of a "Corporation," includes the liabilities of *stockholders.*

When it is decided that "*Corporation*" includes "*stockholders*," it follows that the word includes "*trustees*"—for there is no middle ground between holding the "*Corporation*" means only the abstract incorporeal entity, and that it includes *all the component parts of the Corporation*—which includes the *trustees.*

Therefore we have this result:

FIRST.—The Warehouse Company, under Section 9 of its charter, was subject to the liability of filing annual

reports, as required by Section 12 of the General Manufacturing Act—2 R. S., 6th Ed., p. 506.

SECOND.—Therefore, William Remsen, the defendant, became liable for the notes in suit, because of the failure of himself and his co-trustees, to make, file and publish annual reports during the first twenty days of January, 1876, 1877, 1878, 1879, 1880, and ever since.

The decision of the General Term of the Superior Court, upon reversing the judgment of the Special Term, in the action brought by these plaintiffs against this defendant, *as a stockholder*, of the Warehouse Company, has no bearing upon this action—although, if it *had*, this Court would not be bound by it, as the decision was not a decision of *the highest Court* of the State.

55 Superior Court Rep., 144.

But the questions involved in *that* action, and in ***this*** action, were entirely different, in two respects.

FIRST.—The decision of the General Term went upon the Statute of Limitations—the Court having there held that the plaintiffs should have brought the action against the defendant *as a stockholder*, within six years after the paper *became due*, and that the plaintiffs' cause of action did *not* accrue only upon the return of an execution against the property of the Warehouse Company, which was the contention of the plaintiffs in that action.

No question of the Statute of Limitations arises here, because no such defense is pleaded, and because the action was brought in much less than six years after the notes *became due*.

SECOND.—But besides this, the decision of the General Term went entirely upon a word in Section 9 of the charter of the Warehouse Company, which does not exist in such section in describing *the liabilities of the trustees* of the Corporation—that is, the word "general," as is explained below.

Section 9 of the charter of the Warehouse Company provides that "The Corporation hereby created" (which the Court of Appeals has held to include *the trustees* of the Corporation) "shall possesss all the GEN-"ERAL *powers and privileges* and be subject to all "*the liabilities* conferred and imposed upon Corporations "organized under and in pursuance of the General Manu-"facturing Act."

The General Term held, besides questioning whether it was "a privilege" of a stockholder, that he should not be sued for the debts of the Corporation until the creditor had exhausted his remedy by execution against the property of the Corporation (which view we are confident this Court would not take if the question were before it), that the "*general* privileges" referred to in said Section 9 only meant the privileges which all the component parts of the Corporation, (that is, the Corporation itself, its stockholders, and its trustees), were entitled to.

We seek to show, below, that this is an entirely unsound construction of Section 9.

But whether it be sound or not, the argument has no application to this case.

The language of Section 9 of the Charter of the Warehouse Company, is this:

"The corporation hereby created shall possess all "the *general* powers and privileges, and be *subject* "*to all the liabilities*, conferred and imposed upon "corporations organized under and in pursuance of the "General Manufacturing Act."

The word "*general*," upon which the General Term went in discussing the "*privileges*" of stockholders and trustees, *is omitted* in that part of the clause which describes "*the liabilities*" of stockholders and trustees.

Even if the reasoning of the General Term were sound, as to "*privileges*," the omission of the word "*general*," in referring to "*liabilities*," would not only deprive the reasoning of that Court of all force as to *the liabilities*

of trustees, but the use of the word "general," in Section 9, when referring to "*privileges*," and its *omission* in referring to "*liabilities*," emphazises the fact that the "*liabilities*," need not be "*general*" whatever that may mean.

But the argument of the General Term as to the effect of the word "*general*" is, we submit, entirely unsound even as to "the *privileges*" referred to--although the argument has no place here, because the word "general" does not occur in Section 9, so far as "*liabilities*" are concerned, and because there is no question of the Statute of Limitation in this case.

The General Term argue, as to the effect of the word "*general*" upon "*privileges*," that word meant privileges common to all the component parts of the Corporation--that is, the Corporation itself, the stockholders, and the trustees.

But such a construction as to the meaning of the word "*general*," even in the clause of Section 9 in which it is applied to "*privileges*" is wholly unsound.

Such a construction would make the sentence in which the word occurs, entirely meaningless.

It is impossible to imagine any "privileges," or "benefits" which are common to the Corporation, its stockholders and its trustees.

Seventeenth.

To sum up the whole argument, we submit:

FIRST.—That Squires, President, had *authority*, so far as the plaintiffs are concerned, arising from a long continued course of business, and from the fact that the Directors of the Warehouse Company turned over to Squires, President, the whole conduct of the business of the Warehouse Company, *absolutely*, and were guilty of gross negligence.

SECOND.—That, in point of fact, these endorsements were *not* "accommodation"—the Warehouse Company having received a consideration for them.

THIRD.—That even if these endorsements *were* "accommodation," the fact that the plaintiffs discounted the endorsed notes for the makers, does not preclude the plaintiffs from recovering on them against the Warehouse Company for two reasons:

(*A*.) At the utmost, all that can be said is that the plaintiffs were *negligent* in not following up the inquiry suggested by the facts mentioned.

But no amount of "*negligence*" prevents the holder of the paper from recovery upon it.

(*B*.) The plaintiffs were entitled to rely upon the presumption that the notes were endorsed as a means of "making *advances*" to the makers of the notes, upon the tobacco deposited by them in the stores of the Warehouse Company—the plaintiffs not knowing that the Warehouse Company had leased its warehouses.

FOURTH.—That the plaintiffs were not affected by any knowledge which it is claimed was possessed by "Squires, President," as to his want of power to make the endorsements—*even if such want of power existed*, which we deny.

FIFTH.—Section 9 of the Charter of the Warehouse Company, subjects "*the Company*" to all the "*liabilities*" of the General Manufacturing Act—and the highest Court of this State has decided that "*the Company*" includes *trustees*.

SIXTH.—Section 12 of the General Manufacturing Act (2 R. S., 6th Edition, page 506, Section 47), (12), provides that trustees who fail to file Annual Reports within the first twenty days of January in each year, "shall be "jointly and severally liable for all the debts of the Com- "pany then existing, and for all that shall be contracted "before such Report shall be made."

These notes come within this description, whether the debt is considered as contracted when the notes were *made* or when they *became due.*

The defendant was a trustee throughout the whole period, and no reports were ever made, filed or published.

Under a long line of decisions of this Court the question of the liability of the Warehouse Company upon these endorsements seems to be well settled—as this Court has gone further in protecting *bona fide* holders of commercial paper than even the Courts of New York have gone.

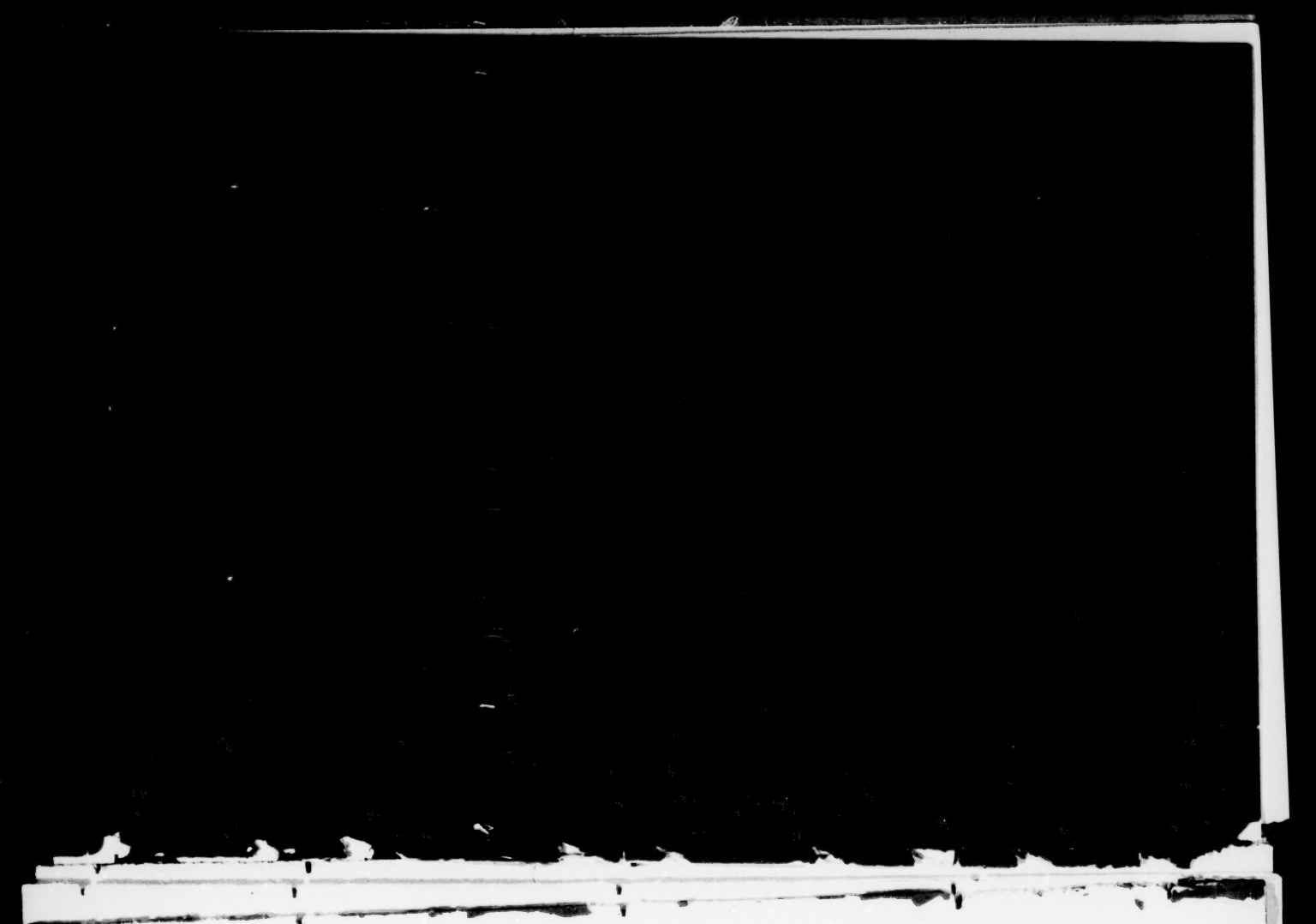
As to the liability of this defendant *as a trustee* of the Warehouse Company, no decision of the Courts of the State of New York stand in the way of the decision of this Court, and the declarations of Section 9 of the Charter of the Warehouse Company, as to the liability of this defendant for failing to file an annual report seem to be too plain for argument.

Eighteenth.

The judgment of the Circuit Court of the United States for the Southern District of New York should be reversed and a new trial ordered, with costs to the plaintiff in error.

NEW YORK, April 13, 1895.

FRANCIS C. BARLOW,
Attorney for Plaintiff in Error.



Supreme Court of the United States.

THE NATIONAL PARK BANK OF NEW YORK,
Plaintiff in Error,

against

CHARLES REMSEN and WILLIAM MANICE, Executors of the Last Will and Estate of WILLIAM REMSEN, deceased,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Defendants' Statement of Facts.

"The German American Mutual Warehousing and Security Company," a corporation of the State of New York, was incorporated by a special public act of the Legislature of the State of New York (by Ch. 701 of the Laws of 1872, passed May 14th, 1872), and invested by such act, and the laws of the State of New York, applicable to manufacturing corporations, with certain special and limited powers, as a *warehouse, wharfage* and *lighterage* company.

Under its special charter, said company did such business for a short time, and then leased its property and transferred its business to an existing firm of warehousemen, and the company did no further storage business, but held occasional meetings of its executive and finance committees as required by its charter and by-laws, and to see if their lessees were fulfilling their contract, and carrying on the business for which the company was chartered.

During this time, a commercial firm of tobacco dealers,

Squires, Taylor & Co., sometimes owners of tobacco stored with the lessees of the company's warehouses, and who were dealers and depositors with the *National Park Bank of New York*, the plaintiff in error, presented to and procured the discount by said bank of the firm notes of said Squires, Taylor & Co. drawn in their own business and name to their own order to raise money for their own benefit, by themselves offering such notes (see fol. 7, p. 4, Transcript of Record) at said bank, but bearing a pretended indorsement in blank of a third party written thereon, in the following form: "*The German American Mutual Warehousing and Security Company, Robert Squires, President.*" This pretended indorsement of a party which was a stranger to the paper and to its commercial form was, in fact, written by said Robert Squires, who, though then president of said company, acted corruptly and collusively in the premises without the authority or knowledge of any other one of the directors, the directors of said company who never knew of the indorsements of the paper of Squires, Taylor & Co., by said Squires, or that he had received commissions from said Squires, Taylor & Co., and it was shown that the "bank made no inquiries as to the authority of such indorsement of anyone." Said notes when offered to the said bank for discount were accompanied with certain collateral securities, in the form of *warehouse receipts* and inspection *certificates* representing each an individual hogshead of tobacco belonging to the makers of said notes and stored in the custody of Berry & Bryan, the then lessees of said warehouses, and about the value of the notes (Tenth Finding, p. 17), and such collateral was particularly mentioned in the form and body of each note (see Record, p. 4, fol. 7), and assigned with such several notes and each of them, to said discounting bank, in which the way had been made and the discounts of such notes recommended by said Robert Squires, who was also a director and member of the "Discount Committee" of plaintiff's bank, and had arranged for and provided for discounts for the makers before maturity. Among such notes of Squires, Taylor & Co. were the notes herein.

The circumstances of the alleged making and indorsements of said notes and the dealings with the same by the makers, Robert Squires and the discounting bank, and how the company prepared and procured discount of their own notes, or those belonging to their own business, and that the bank was familiar with the differences in form and offering of the notes offered for discount by the company as distinguished from such as those offered by Squires, Taylor & Co., are substantially set forth in the *findings* herein, FIRST to EIGHTH inclusive. (Record, 14, 15, 16.)

The Bank brought suit on some of said notes of Squires,

Taylor & Co., as alleged indorsers, against the Warehouse Company and recovered judgment therefor, which judgment was finally, on the 8th of October, 1889, reversed by the New York Court of Appeals (116 N. Y. Ct. of Apps. Rept., 281), on the ground that the alleged indorsements were unauthorized and unlawful, and the company not liable therefor.

Meanwhile the plaintiff in error had sued the defendant in error in the U. S. Circuit Court below for the Southern District of New York, as a stockholder and trustee of said Warehouse Company, which he was, and alleged to be liable to the creditors thereof for its debts by reason of the failure of the company to file annual reports as required by the laws of New York, and, as it appears, it did not file, which suit was pressed to trial by plaintiff, notwithstanding the decision of the Court of Appeals reversing the judgment against said company on the principal claim, on the same evidence and proofs as herein, and proof further that the defendant in error was a stockholder and trustee in said company, and that it had not filed such annual reports as are required by § 12 of the Act of Feb. 17th, 1848, known as the "General Manufacturing Act."

On the trial herein judgment was rendered against the plaintiff in error and in favor of the defendant in error, not merely on the authority of the decision of the New York Court of Appeals on the main question of the principal debt, and the construction of the charter of the said company by the N. Y. Court of Appeals, but "*de novo*" on the merits and law of the case. (See report in *43d Federal Reporter, 226.*) From this decision the plaintiff in error appeals to this Court.

It was stipulated on the trial below that in case of the death of the original defendant, William Remsen, before final judgment and the determination of this action, the alleged cause of action should survive and not abate, as it otherwise would have abated, and that the representatives of said William Remsen might be substituted as defendants.

Points for Defendants in Error.

There was no error on the part of the learned Justice of the Circuit Court for the Southern District of New York.

The two following points irresistibly demand the confirmation of the decision of the Court below:

Point A.

The case primarily involves *the construction of a statute* of the *State* of NEW YORK, *viz.:* CH. 201 *of the laws of 1872*, the special corporate charter and the authority conferred by the State of New York upon "*The German-American Mutual Warehousing & Security Company*," and especially § 3 thereof, which relates to its general and special powers, and § 9, which adds to its powers and privileges, and subjects it to the liabilities imposed by the Act of February 17th, 1848, known as "The General Manufacturing Act," "*where the provisions thereof are not inconsistent with the express provisions of this Act*" (§ 9, Ch. 201, ll. 1872, The Charter of the Company).

Argument.

The plaintiff, a BANK and also a *New York corporation*, sued another *New York corporation*, a warehouse company, in a *New York Court*, on a *contract* made and to be performed in New York. The learned Chief Justice of the Court of Appeals, in the original case of the NATIONAL PARK BANK, &c., *vs.* THE GERMAN AMERICAN WAREHOUSE, &c., CO., 116 N. Y., 281, decides, with the unanimous concurrence of the Court, that the warehouse company, charged as indorsers of these same notes of Squires, Taylor & Co., had no authority under any circumstances, with or without knowledge, or with or without compensation in commissions, to indorse for the accommodation of third parties.

The New York Court of Appeals reversed the judgment, at first recovered on the principal claim against the company, as alleged indorsers, and holds that there was *no debt* incurred by the company. That reversal carried with the secondary liability, if any, of this defendant in error as trustee, or stockholder, liable for the debts of the company. See decisions 116 N. Y., 281, &c., and by Judge Coxe below, Record, fol. 42, where he says that the Court of Appeals "*considered every fact necessary to the decision.*"

Authorities cited.

Park Bank *vs.* German American Warehouse Co., *supra.*

And see also cases cited in *Deft's Brief* 116 N. Y., *at p. 284*, relative to corporate powers in New York law.

See also *this case* in the Court below.

43 Federal Reporter, 226.

Sub-point 1.

The New York Court of last resort having thus settled the powers of one of the political organizations specially chartered by that State, such decision is finally authoritative and binding as the Federal Court's have, by comity, themselves provided, and under the authority of the Constitution have given full effect to the judicial decisions which affect local laws.

Authorities cited.

U. S. Statute of 1739, § 34, Rev. D, § 721.
Claiborn vs. *Brooks*, 111 U. S., 400.

The U. S. Supreme Court has itself decided that it cannot reverse the decision of a State Court in the absence of a Federal question giving it jurisdiction.

Davis vs. *The State of Texas*, 139 U. S., 651.
Hamblin vs. *The Western Land Co.*, 147 U. S., 531.

A State Court's decision, as here, that one of its corporations has performed an unlawul act, or violated its charter, is regarded as binding on U. S. Courts, and even this highest tribunal recognizes its conclusiveness.

Smith vs. *Kernochen*, 7 How., 198.
Luther vs. *Borden*, 7 How., 1.
Nesmith vs. *Sheldon*, 7 How., 812.
Webster vs. *Cooper*, 14 How., 488.
Randall vs. *Brigham*, 7 Wallace, 523.
Greene vs. *Neal*, 6 Peters, 291.

The *U. S. Statute* of 1839 and the decisions above, with many others, establish that rights settled by the States shall be guides to the Courts of the United States in controversies depending before them.

U. S. vs. *Worson*, 1 Gallison, 534

And decisions of the highest judicial tribunals of the States are conclusive *evidence of the law* upon the right or claim between the parties.

Meade vs. *Beal*, Taney, 339.
First National Bk. vs. *Bennington*, 16 Blach., 53.
Van Bokelin vs. *Brooklyn City R. R. Co.*, 5 Blach., 379.

For interpretations within a State of a local law, become a part of that law, (Christy *vs.* Pridgeon, 4 Wall., 196).

And especially authoritative are State decisions *regarding Statutes* (as the *charter* of the Warehouse Co).

Burgess vs. *Seligman*, 107 U. S., 20; §§ 4 & 6 of Syllabus give the rule, and
Tomes vs. *Barney*, 35 Fed. Rep., 112.
McElvaine vs. *Brush*, 149 U. S., 971.
Morley vs. *Lake Shore R. Co.*, 146 U. S. 162;
Miller vs. ~~*Anderson*~~ *Swann*, 150 U. S., ~~1028~~ 132.

Or in the *construction of a rule of property.*

Kaukara Water Power Co. vs. *Green Bay Canal Co.*, 142 U. S., 1004.

When the higher State Courts adopt new views, and reverse former decisions, Federal Courts follow :

Leffingwell vs. *Warren*, 2 Black., 599.
Baiserman vs. *Blunt*, 147 U. S., ~~116~~ 647;
Beauregard vs. *The City of New Orleans*, 18 How., 497.

Decisions upon the validity of contracts, such as these, this Court will not review.

Chicago & Alton R. R. vs. *Wiggins*, 119 U. S., 616; (1886), Ch. J. Waite citing cases.
DeSaussure vs. *Gaillard*, 127 U. S., 216.
See also *Albany Law Journal*, 15,267.

Any interference, therefore, with the decision of the N. Y. Court of Appeals, would be contrary to the provisions of the Constitution of the United States, Article IV., § 1.

The decision of the COURT OF APPEALS, *supra*, is, therefore, *the law of this case.*

To indorse the notes of third parties, by way of accomodation or guaranty, for commissions, would clearly be, not merely a favor, but a BUSINESS *for profit*, which the company was never empowered by its charter, or authorized in any way to transact.

So obvious is the impropriety and invalidity of such transactions, that the current law of judicial decisions forbidding the same, has now been enacted in the specific prohibition by the ~~laws of~~ Ch. 687 of ~~1892~~ 1890 of N. Y., 1892, § 19,

"*No corporation, except a corporation formed under or subject to the* BANKING LAWS *shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, &c.*

Point B.

Although the Federal Courts are not bound to the same interpretations of general commercial law, as the courts of the several States, yet "considerations of comity and the orderly administration of justice, are against the assertion of their power to differ with State interpretations of the law of commercial paper." P. 22, Record - Jdg. Coes decision.

The Circuit Court decided the question of *commercial law* involved in this case, relative to the promissory *notes*, and alleged *indorsements* substantially to this effect; that the possession of a note by the makers, bearing a strange indorsement not required by the form of the paper, gives notice when presented by the makers for discount for their own benefit, that the indorsement was for the accommodation of the makers. This was obvious from the logic of the transaction and the law of commercial paper (116 N. Y., 287, of Deft's. Brief, cases). The law of the place of contract and discount, and the *lex fori*, as declared in that case, is also *concurrent with an authoritative Federal decision of the U. S. Circuit Court*, in 1874 for the 8th Circuit, in *Lemoine* vs. *The Bank of North America*, 3 Dillon, 44, which agrees with the New York cases, and which has never been questioned by this Court.

A learned and distinguished Judge Dillon, in a suit against a New York corporation, recognizes the principles of commercial law, which are binding here.

Argument.

A New York contract, made, and to be performed in New York, by New York parties, on all sides, is sued upon in a New York Court, which decides upon the charter powers of one party and the logical principles of business, that the fact of the makers of notes, holding and presenting their own paper, drawn to their own order, bearing an indorsement other than their own as payees, presents evidence in itself, on the paper, and circumstances, that such strange indorsement is an *accommodation* indorsement. (Lemoine case, *supra.*)

The form, ownership and possession of the paper plainly disclosed its character to the bank, and that it was, *as to such indorsement, not* in the usual course of business, either of the makers or of the alleged corporation indorsers.

Authorities cited.

In Lemoine *vs.* The Bank of North America, 1874, 3 Dillon, 44. Exactly the same question of general commercial law arose

as is presented here, and the presumptions arising from just such transactions in negotiable paper were discussed and decided.

Judge Dillon examines the law.

A copartnership indorsement was made by one of a firm, without authority. and without the knowledge of the other members of the firm, and not in the regular business of the firm. It was declared an *accommodation* indorsement, and the learned Judge states the question thus:

"*Does the fact that the maker is in possession of a note before maturity, indorsed by another, affect the bank that receives it from the maker, and discounts it for him, with notice that it was indorsed for the maker's accommodation?*"

The judge declares that he was at first inclined to hold the bank as an innocent holder for value, without notice, "but," says he, "subsequent reflection has brought me to an opposite conclusion."

To make accommodation paper is so entirely *extra* the business of a copartnership and the legitimate authority of a partner, that *the presumption is against*, and *properly* against the power of one partner, thus to bind his copartners; for suretyship, it has been well remarked is, "*a contract which* carries with it a lesion by its very nature" (citing *Louisiana, &c. Bank* vs. *Nav. Co.*, 3 La. An., 294); see also *Boyd* vs. *Plumb*, 7 Wend., 309. The Court then examines the law, *Lemoine Case, supra* (50 & 51 of op.), and cites the leading old New York case of *Hall* vs. *The Catskill Bank*, 18 Wend., 478, where *Chancellor Walworth* reviewing such facts as here, says: "*The transaction on its face, shows that it is a mere accommodation indorsement*, or the note would not be in the hands of the drawer, and the transaction constitutes, not merely presumptive, but "*actual notice of the fact, that it is* NOT *signed in the ordinary course of partnership business.*"

This original New York Case has been quoted and approved in other States,as in *Hendrie* vs, *Berkowitz*, 37 Cal., 113, where it was held to be a "*presumption*" that such an indorsement was an *accommodation indorsement.*

So in *Overton* vs. *Hardin*, 6 Coldwell, 375, where the Court says, "*There can be no doubt that the possession of an indorsed note by the maker, is presumptive evidence that it was indorsed for his accommodation;* citing *Edwards on Bills*, 103, 105; and another New York case, *Brown* vs. *Taber*, 5 Wend., 566.

And in Erwin *vs.* Shaffer, 9 Ohio St., 43, it is held, as to such an undue indorsed note in the hands of the maker, "it is *a matter of legal presumption* that the note is unsatisfied, and is indorsed, and placed in the hands of the maker, *for his accommodation;* citing several cases (52 of Op.) and also *Stall* vs.

Catskill Bank, supra, as the New York law, cites also *Bank of Rochester* vs. *Brown*, 7 Wend., 159, and *Byles on Bills*, 47 and note. See also a clear and thorough article in *5 Central Law Journal*, 361, of article.

The case *Ex parte Estabrook*, 2 Lowell, 547, cited below as a federal authority, equal and contrary to the *Lemoine* case, *supra*, was considered by Ch. J. Follett, in the Court of Appeals decision which decided against the debt in this case, *116 N. Y., 281, &c., supra*, and was adjudged to be contrary to the decisions in New York, and "without the support of any well considered case" (p. 293 of Op.).

A review of the opinion of Judge Lowell will show, that he was not considering a case like this, as the cases cited by him are not at all like the questions here.

Goodman *vs.* Simonds, 20 How., 343, was not a case where the markers offered the note for discount with a strange indorsement on it. And the question of knowledge was one of fact, and not, as here, a question of presumption from the very paper itself, and the ownership and offering of it.

Murray *vs.* Lardner, 2 Wall., 110, was not a note question at all, but one of coupon bonds payable to bearer, and a question of title was involved.

There is no such question here.

Michigan Bank *vs.* Eldred, 9 Wall., 544, was where a firm were proved to have been in a habit of indorsing negotiable paper, and one member, who by the articles of copartnership had *not* the power to do so, indorsed, it was held good in the hands of an innocent holder for value who did not know that the indorsing partner had not the usual partner's power.

Hotchkiss *vs.* National Banks, 21 Wall., 354, relates to title to negotiable bonds, and not to notes in the hands of makers indorsed with the names of third parties.

The case *Ex parte Estabrook* is not at all an authority, or any point in this case, and it is not really contrary to it, for the same legal questions were *not adjudged*.

Should this Court, however, consider that these Federal cases are contrary to each other, then the determining judgment, which is to make commercial law for the nation should as to this case, be in accordance with the law of indorsements, and notice, as decided in New York, as the *lex loci contracti*, and the *lex fori*, and the decision of the Eighth District Court, by Judge Dillon, as clearly stating the science of negotiable paper, as to the questions arising here.

Sub-Point B. 1.

It makes no difference if the accommodation indorsement was paid for, it was still "*accommodation*," and as to a corporation not authorized to do such business was all the more unauthorized, unjustifiable, *ultra vires* and VOID.

116 ~~120~~ N. Y., 281, and cases at 292 of Op.

And the plaintiff in error, as a New York City Bank, was bound to know that such an indorsement did not even seem to be in any usual course of business, but was obviously "*accommodation*."

Point C.

The Warehouse *Company* itself *having no power* to do the act or make the contract relied on as the basis for the principal debt or liability alleged against it, and claimed as a debt to be charged to the defendant in error as a trustee and stockholder of the *Company*, the plaintiff has *not proved* and *cannot show a personal liability* of the *defendant*, for there was *no corporation* debt. The entire foundation for and condition precedent of any secondary claim against the defendant in error was thus extinguished. *There was no debt* for which he could be held liable. The Court of Appeals had said "*no debt*" of the Company arose or could arise from the facts proved, there was therefore no basis for a secondary liability of the defendant, and no principal debt was proved in this case.

Authorities cited.

116 N. Y. *supra*, and *Garrison* v. *Howe*, 17 N. Y., 458.
Shaler & Hall Quarry Co. v. *Bliss*, 27 N. Y., 300 of Op.

And any debt must have been *proved in this case* in the Court below, as the decision of the case against the Company alone would not have been sufficient if it had held that there was *a debt* on the part of the Company.

McHarg v. *Eastman*, 35 How., 205.
Vincent v. *Sands*, 33 Super. Ct., 511.
Miller v. *White*, 50 N. Y., 137.

But the decision of the Court of Appeals on the whole record

which was offered to the Court below as proof of debt was that there was *no debt*, and so the Circuit Court decides on the evidence, as well as on the authority of the Court of Appeals. It is unnecessary, therefore, to inquire whether a trustee of a corporation could be held liable for a mere business default not constituting a debt.

Point D.

It cannot be necessary, just or reasonable to inquire whether the Company knew, or might have known, what had been done or attempted, or if some of their officers had received commission for making pretended and unauthorized indorsements of third parties' notes, the *indorsements* were *unlawful*, if ever so well known, and *the more unlawful, the more they were known.*

The Company was not empowered to do any such business.

Authorities cited.

Morawetz on Private Corporations, p. 46, R. II.
Alexander v. *Cauldwell*, 83 N. Y., 480.
Cumberland Coal Co. v. *Sherman*, 30 Barb., 575.
Angel & Ames on Corporations § 304 and 517, and the original case in 116 N. Y., 287 of Brief, and *Cases cited.*

Argument.

It was proved as a matter of fact, however, and is so *found* in this case, that no one but the *writer* of the same, Robert Squires, knew of any one of the alleged indorsements.

The decision of Judge Coxe below well sums up the binding authority of the decision of the Court of Appeals as follows: "*This decision sets at rest forever the question of the liability of the Warehouse Company upon these notes. They can never be enforced against that Company.*" * * * "*The highest tribunal of this State* (New York) *has decided*, that the notes were never an obligation of the Company."

(Record, p. 21-22.): "*In order to hold this defendant liable it is necessary to disregard that decision.*"

As to all the ingenious arguments of counsel for plaintiff in error as to "*implied authority*," "*presumed knowledge*," "*course of business*," &c., they may be answered with the general proposition that where there was no authority, no amount of knowledge, express or implied, could create it.

The more knowledge, as to the doing of unlawful acts, the more culpable the company in *violating the law*, by doing a business which they had never been authorized to do, and which the Bank had no reason to suppose they were authorized to do. The Bank had discounted the company's own paper, and paper belonging to them, and knew their form of business. So that *knowledge*, may be imputed to the bank by the appearance of the facts, on the very face of the notes and their presentation by the makers in their own business for discount for their own benefit, bearing a pretended indorsement of a third party not a party to the paper, that it was not in regular course of the company's business and must have been an *accommodation* indorsement by a corporation not apparently empowered to do a guarantee business for third parties, and therefore "*ultra vires.*"

But it is fair to infer from the Bank's receiving collateral security in warehouse receipts, or "inspection-certificates," from the makers of the notes who were owners of the collateral, so pledged to the Bank, that the Bank did not rely even on the supposed validity of the alleged indorsements, but held the collateral security itself, as *lender to the makers* of the notes and owners of the collaterals, of which the Bank was made pledgees and not on the credit of the alleged indorsers.

Indeed, if the company had been lawfully lending or selling a valid indorsement for guaranty to enable the makers to get discounts on their credit, the company would in the usual course of business have demanded and held the collateral to secure them for lending their credit at the discounting bank.

Alleged Errors.

1. The plaintiff in error assigns as error, that the Court below erred in finding that the indorsement on the notes involved in this action were accommodation indorsements.

> This is answered, and the Court below sustained by the law set forth in Point "B" *supra.*

2. That the Court below erred in finding as a conclusion of law that the Warehouse Co. had no power under its charter to make such indorsements.

> This is answered and the Court below sustained by the charter itself and by the N. Y. Court of Appeals in construction thereof, in 116 N. Y., 281 &c., and Point A, *supra, and cases cited.*

3. That the Court below erred in finding conclusion of law "*Third.*"

This is answered by Points "C and D" *supra*, p. 10.

4. That the Court below erred in finding, as a conclusion of law upon the findings of fact, that the liability sued for was not a debt of the warehouse company of which defendant in error was a trustee, and that he cannot be held liable therefor.

This is answered by Points A, B, C and D.

5. That the Court erred in finding that the judgment must be for the defendant.

Is answered in all the preceding Points A, B, C and D.

6. This assignment is logically involved in the preceding 5, and is answered in

Points A, B, C and D.

7. This assignment is logically involved in assignment 5, and answered therewith,

And in Points A, B, C and D.

The prayer that the judgment below may be reversed, and judgment directed for the plaintiff in error, is answered by the judgment of the Court below (43 *Federal Reporter*, 226), and all the findings of fact and conclusions of law, and by the brief, citations and arguments foregoing, for the defendant in error.

Point E.

The defendant in error endeavored to secure larger and more complete findings upon several points, but the learned Judge did not appear to deem them essential to sustain his judgment.

Record, p. 23, "Note" in fol. 42.